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No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CARL WHORTON, KEN WHORTON, *et al.*,
Petitioners,

v.

SURTRAN TAXICABS, INC., YELLOW CAB OF DALLAS, INC., FORT WORTH CAB & BAGGAGE CO., INC., CITY OF DALLAS, TEXAS, CITY OF FORT WORTH, TEXAS, CITY OF IRVING, TEXAS, CITY OF GRAPVINE, TEXAS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether a federal court is precluded from using a retroactive state statute validating a local government's prior monopoly contract to establish "a clearly articulated and affirmatively expressed state policy" showing "the legislature contemplated the acts complained of."

II. Whether the Local Government Antitrust Act of 1984 does not permit a federal court to weigh alternative, non-existent remedies against private defendants as a ground for granting a local government defendant retrospective immunity from all remedies, legal and equitable.

LIST OF PARTIES

The parties to the proceedings below were:

Petitioners here, intervenor-plaintiff-appellants Carl Whorton et al.*

Appellants below, plaintiffs John Woolen (now deceased) et al.**

Respondents here, Surtran Taxicab, Inc., Yellow Cab of Dallas, Inc., Fort Worth Cab & Baggage Co.,*** City of Dallas, Texas, City of Fort Worth, Texas, City of Irving, Texas, City of Grapevine, Texas.

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* The Whorton-intervenor-plaintiffs represent over 200 individually named taxicab drivers.

** The Woolen individual plaintiffs and the Dallas Taxi Association were certified as class representatives.

*** Surtran Taxicab, Inc. is owned by Yellow Cab of Dallas, Inc. and Fort Worth Cab & Baggage Co. All are presumed to be closely held private corporations.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Carl Whorton, Ken Whorton, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the proceeding entitled *Woolen, et al. v. Surtran Taxicabs, Inc., et al.* on September 26, 1986.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals for the Fifth Circuit is reported at 801 F.2d 159. It is

reprinted in Appendix A hereto and includes the opinion of the United States District Court for the Northern District of Texas.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on September 26, 1986.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The federal statutes involved are the Sherman Act and Clayton Act, 15 U.S.C. §1 et seq., and the Local Government Antitrust Act of 1984, 15 U.S.C. §35 (Supp. III, 1985). The latter Act is reprinted in Appendix B.

The state statutes involved are the Texas Motor Bus Act and Texas Municipal Airports Act. Relevant sections of the statutes are reprinted in Appendix C.

STATEMENT OF THE CASE

This case raises an antitrust challenge to local government ordinances that required taxicabs to "deadhead" from the Dallas-Fort Worth Regional Airport during the five year period 1974-1979. The Dallas-Ft. Worth Regional Airport is the only Texas joint city airport that is located outside the city limits of both cities and is circumscribed by territory not within the territorial limits of either city. City ordinances compelled taxicab owners to "deadhead," that is, to carry passengers to the airport, approximately twenty miles, and to return empty, without passengers.

This suit began in 1978 when some 200 individually named taxicab owners joined to sue in federal district court to recover treble damages against the cities and private defendants because of the damages the owners had suffered from being compelled to deadhead. These owners have been designated "the Whortons" and are the petitioners here. Their complaint was that the Dallas-Ft. Worth Joint Airport Board's grant of an exclusive franchise contract to a private corporation, partially owned by Yellow Cab of Dallas, Inc., to carry all outbound passengers from the airport was not authorized by state law and violated the Sherman and Clayton Acts. 15 U.S.C. §1 *et. seq.*, (1976). Shortly before their suit, a similar suit was filed seeking a class action for injunctive relief. A plaintiff in that suit was, among others, the Dallas Taxi Association, an association chartered by Yellow Cab of Dallas, Inc., one of the private defendants in both suits. The Whortons' individual damage action and the Dallas Taxi Association class injunctive suit were consolidated for pretrial.

In November 1978, then District Judge Patrick E. Higginbotham overruled defendants' motions for dismissal based in part on state action immunity. He held the exclusive contract and deadheading requirement were not immunized by the state action defense and must stand trial under the rule of reason. *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025 (N.D. Tex. 1978). The consolidated cases were transferred to Judge Mary Lou Robinson. Two years later in December 1980, after discovery limited to the class certification issue, Judge Robinson certified a Federal Rule of Civ. Proc. 23(b)(2) injunctive class, named the Dallas Taxi Association and its lawyer as the class

representative, denied the individual Whorton drivers the right to opt-out, and denied their alternative motion to intervene. On appeal by the Whortons, the Fifth Circuit declined to rule on their right to opt out but reversed the denial of intervention and remanded in August, 1982. *Woolen v. Surtran Taxicabs*, 684 F.2d 324 (5th Cir. 1982). For three years, Judge Robinson continued her stay of discovery on the merits until August 8, 1985 when she dismissed as to all defendants.

Substantial changes occurred during the interim period. Shortly after Judge Higginbotham ruled in 1978, the first five year exclusive contract expired in 1979. After this lawsuit was filed, and in response to the inefficiency and to public protest, the Dallas-Ft. Worth Joint Airport Board and the cities modified the exclusive monopoly contract and compulsory deadheading, and changed to a system allowing access by all taxicabs to the outbound business by paying a pickup fee. These changes substantially mooted prospective injunctive relief in the pending suits.

In 1983, the Texas legislature then amended the Municipal Airports Act to add the provision that:

> (d)(6) Taxicab Licensing . . . [A] joint airport board . . . shall have power to license taxicabs picking up passengers at or delivering passengers to the airport.

Ch. 626, 1983 Tex. Gen. Laws, at 4015, TEX. REV. CIV. STAT. ANN. art. 46d-14(d)(6) (Vernon Supp. 1985). Section 2 of a different amending Act, added the provision that Judge Robinson subsequently found

"validated" the prior exclusive joint board monopoly contract from 1974 to 1979:

> Any and all contracts, leases, or other arrangements for the use or occupancy of airport property executed by joint boards . . . prior to the effective date of this Act, are hereby validated and confirmed and the same are fully effective and represent the lawful agreements and undertakings of joint boards in accordance with the terms thereof.

Ch. 978, 1983 Tex. Gen. Laws, at 5322, 5323, TEX. REV. CIV. STAT. ANN. art. 46d-14(d) note (Vernon Supp. 1985). App. C-II.

On August 8, 1985, Judge Robinson granted the defendants' motions to dismiss and for summary judgment. Among other grounds, she ruled that "[f]or purposes of antitrust analysis, the [1983] validation statute itself, by validating and confirming the contracts in question, is an adequate indication" of state policy. 615 F. Supp. at 349, 801 F.2d at 163. In the alternative, she ruled that the Local Government Antitrust Act of 1984, 15 U.S.C. §35 (Supp. III, 1985), allows the federal court to consider alternative relief to private defendants as a ground for granting retroactive immunity from damage remedies to the local government. 801 F.2d at 165. But in the remaining part of her opinion, Judge Robinson denied all relief against the private defendants under the *Noerr-Pennington* doctrine. The Whorton intervenor-plaintiffs, as well as the other plaintiffs, appealed. On September 26, 1986 the Fifth Circuit affirmed in a per curiam opinion on the basis of the district court's opinion.

REASONS FOR GRANTING THE PETITION

I. THE TEST FOR DECIDING WHETHER A STATE POLICY AUTHORIZING MUNICIPAL ANTICOMPETITIVE ACTIVITY EXISTS IS A PROSPECTIVE TEST TO BE APPLIED BEFORE THE ACTIVITY, AND NOT A RETROACTIVE TEST, TO BE APPLIED AFTER THE ACTIVITY.

A.

Parker v. Brown, 317 U.S. 341 (1943) held that under the "state action" doctrine, a cartel of raisin growers was immune under the federal antitrust laws because a California statute enacted prior to the anticompetitive activity authorized the price fixing monopoly. However, in dictum this Court implied that the test for measuring the grant of immunizing state authority is to be applied prospectively and not retroactively:

> [*A*] *state does not give immunity to those who violate the Sherman Act by* authorizing them to violate it, or by *declaring that their action is lawful.*

317 U.S. 341, 351 (1943) (emphasis added).

Thus it seems clear that if the state statute in *Parker v. Brown* had been passed after, rather than before the anticompetitive activity, the Court would not have allowed immunity for the period before the passage of the statute.

B.

Forty years later, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), although upholding the state action defense on the basis of pre-existing stat-

utes, restated the judicial test that had evolved. That test requires a " 'clearly articulated and affirmatively expressed' " state policy in statutes showing that " '*the legislature contemplated the kind of action complained of.*' " (emphasis added) (citation omitted). *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, at 44 (1985). The plain meaning and purpose of this test is to require that the state statute expressing state policy pre-exist the activity, and, by implication, to preclude the state from retroactively establishing its policy and authority by a ratification statute attempting to legalize prior anticompetitive activity. See also *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985).

C.

Since the date of the *Town of Hallie* decision, apparently all federal circuit court decisions applying the *Hallie* test have found municipalities immune on summary motions. Nevertheless, all circuits, although reaching results favoring the local governments, have restated the rule in *Hallie* to require that the proper test is a prospective one of *foreseeability*, and not a retroactive test of ratification. For example, the Second Circuit in *Cine 42nd Street Theater Corp. v. Nederlander Org.*, 790 F.2d 1032, 1042 (2d Cir. 1986) stated: "The Court thus indicated *the test should be one of foreseeability*—whether the legislature could foresee the anticompetitive effects that would follow from the express authority the state had delegated to its cities." (emphasis added). See also *Montauk-Caribbean Airways v. Hope*, 784 F.2d 91, 95 (2d Cir. 1985), *cert. den.*, ___U.S. ___(1986).

The foreseeability standard, or versions of it, have been articulated in other circuits as well. *La Salle*

Nat. Bank of Chicago v. County of DuPage, 777 F.2d 377 at 381 (7th Cir. 1985), *cert. den.*, ___U.S. ___ (1986); *Mercy-Peninsula Ambulance v. San Mateo County*, 791 F.2d 755, 757 (9th Cir. 1986); *Grason Elec. v. Sacramento Mun. Utility Dist*, 770 F.2d 833, 836 (9th Cir. 1985), *cert. den.*, ___U.S. ___(1986); *Auton v. Dade City, Florida*, 783 F.2d 1009, 1011 (11th Cir. 1986); *L & H Sanitation v. Lake City Sanitation*, 769 F.2d 517, 520 (8th Cir. 1985); *Mass. Furniture & Piano Movers Ass'n v. F.T.C.*, 773 F.2d 391, 396 (1st Cir. 1985).

D.

The Fifth Circuit in this case adopted a retroactive, rather than a prospective test in conflict with *Parker, Hallie* and other circuits. Although reciting and claiming consistency with these decisions, the district court's opinion characterized the 1983 Texas legislation as a "validation" statute "itself" supplying the necessary evidence of state policy to meet the *Hallie* test during the period of the 1974-79 exclusive monopoly contract:

> For purposes of antitrust analysis, the validation statute itself, by validating and confirming the contracts in question, is an adequate indication of the state's desire to allow joint airport boards to displace competition through anticompetitive measures in the area of taxicab services to municipal airports. 801 F.2d at 163.

The above quoted passage implies that the retroactive test embodied in the statement and employed by the court was essential to establish a state policy au-

thorizing the monopoly contract governing the period 1974-79.

E.

The retroactive test endorsed by the Fifth Circuit cannot be dismissed as surplusage and dictum on the theory that even without considering the 1983 legislation, there was pre-existing statutory authority for the 1974-79 contract. Judge Patrick E. Higginbotham, then district judge, in overruling motions to dismiss based on the state action doctrine, had already ruled in 1978 that the cities and the joint airport board at that point in time did not have state authority to enter into an exclusive taxicab contract on outbound business at the joint regional airport and their arrangement must stand trial under the rule of reason. *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025 (N.D. Tex. 1978). His opinion also clearly implied that if regulatory authority over taxicabs traveling back and forth between city limits and territorial limits of the Dallas-Ft. Worth Airport were also subject to regulation by the Texas State Railroad Commission, and not subject to exclusive regulatory authority by the cities and the joint airport board, then a State Railroad Commission certificate was not proof of the State's intent to validate the monopoly contract on outbound business. 461 F. Supp. at 1032, 1033.

Professor Areeda endorsed Judge Higginbotham's ruling saying "[i]t is both unusual and inefficient to require other cabs leaving passengers at the airport to return empty to the city." P. AREEDA & D. TURNER, ANTITRUST LAW (1978, Supp. 1982), at 54; see also Cirace, *An Economic Analysis of the "State-*

Municipal Action" Antitrust Cases, 61 Tex. L. Rev. 481, 503 (1982).

Nevertheless, the Fifth Circuit here found *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir.), *cert. denied*, ___U.S. ___(1985) "virtually indistinguishable." 801 F.2d at 161. The Fifth Circuit rejected the specious distinctions urged by the Dallas Taxi Association "plaintiffs" that there was a difference of ownership and a "regulatory void" at the DFW Regional Airport. 801 F.2d at 162. But the Fifth Circuit failed even to acknowledge the important, real and valid distinctions urged by the Whorton intervenor-plaintiffs that unlike taxi transportation through contiguous territory subject to exclusive local legislative power at the Houston airport, the transportation to and from the Dallas-Ft. Worth Regional Airport territory crossed through territory subject to power of other municipalities and reserved by the State to the State Railroad Commission.

This distinction, based upon the allocation of dual regulatory power and of territorial power between state and city governments follows the analogous distinction recognized by this Court in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). The state-local-territorial power distinction is the basis for this Court's restraint against parochial interests of one municipality unreasonably controlling unrepresented municipalities in a regional market. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 404-406 (1978); Hovenkamp & Makerron, *Municipal Regulation and Federal Antitrust Policy*, 32 U.C.L.A. L. Rev. 719 (1985) (advocating that the courts use a territorial approach to the state action defense).

Because it was necessary in 1983 to amend the Motor Bus Act, TEX. REV. CIV. STAT. ANN. art. 911a, §1(c) to remove the mandatory regulatory power of the State Railroad Commission, see App. C, and this was an integral part of amendments to the Municipal Airports Act transferring power to the joint airport board, then both as a matter of law and as a matter of the district court's characterization, the 1983 retroactive "validating" legislation was essential to establish statutory authority in the joint airport board for the period 1974 to 1979.

The district court and Fifth Circuit, however, assumed that if the State Railroad Commission had potential, but unexercised, authority in the time period 1974-79 to authorize an exclusive contract on outbound taxicab service through multiple counties and cities, then it was irrelevant that the DFW Joint Airport Board had usurped the State Railroad Commission's authority prior to 1983. Thus the Fifth Circuit endorsed and applied, not the required, prospective "clearly expressed and articulated" standard of preexisting power in the local government, but a retroactive, imprecise "suggestion" standard of power in the State agency: "This [1983] clarifying legislation does not suggest that no power to regulate existed before its enactment. The validating statute suggests just the opposite." 801 F.2d at 163.

But what prior state statute embodied the state policy? The Dallas-Fort Worth Joint Airport Board under the Municipal Airports Act had no jurisdiction, and the Texas State Railroad Commission had jurisdiction but no articulated policy and furthermore had not exercised its jurisdiction. *Woolen v. Surtran Taxicabs*, 461 F. Supp. at 1032, 1033 (N.D. Tex. 1978).

The Fifth Circuit's opinion also misconceived the anti-monopoly intent of the 1983 Texas legislature as to future state policy after 1983. The intent of the 1983 Texas legislature was to terminate the Yellow Cab monopoly at the Dallas-Ft. Worth Regional Airport, and not as the Fifth Circuit implies, to create prospective and retrospective economic regulatory power in the DFW Joint Airport Board to reinstitute the regional taxicab monopoly. As Governor Mark White stated:

> Specifically, my concern that the original bill placed the State in the position of legislating a monopoly for a single taxi company, while preventing free market competition, has been sufficiently addressed. . . .
>
> Rumors that there would be a veto of this legislation should be put to rest.

(Press Release, May 27, 1983). App. D.[1]

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[1] Governor White's statement refers to the 1983 amendment of the Motor Bus Act, TEX. REV. CIV. STAT. ANN. art. 911a §1(c) that was an integral part of the 1983 amendments to the Municipal Airports Act. As set forth in the Whorton appellants' Fifth Circuit Reply Brief and Statutory Appendix, the legislative history of multiple bills integrated into the 1983 and 1985 legislation is complex. In addition to an anti-monopoly goal, the final outcome shows that the 1983 Texas legislature drew a clear distinction between solely municipal airports under TEX. REV. CIV. STAT. ANN. art. 14d-4(a)(2), such as Houston, and powers over taxicabs at the Dallas-Ft. Worth joint airport under Article 14d-14(d)(6), that were subject to mandatory State Railroad Commission regulation until the legislature removed its power over such taxicabs, abortively in 1983, and finally, successfully in 1985. See App. C. The following cases therefore are distinguishable, primarily on the grounds that authorizing state statutes

F.

Multiple policies based upon antitrust law, federalism and legal order support the need for this Court to reaffirm its prospective rule and reject the Fifth Circuit's retrospective rule. Otherwise, as a practical matter, local governments and dominant private interests, as here, will engage in anticompetitive monopoly contracts with impunity. For they know that if and when they are challenged, because the State has an interest in immunizing the local government from damages, the State will retroactively validate the contracts, on condition the local government cease its anticompetitive monopoly. But in the interim the damage has been done. Such a boot-strap system of retroactive authority leaves a loophole seriously emasculating the power of Congress to define and to prohibit anticompetitive activity because the victims of the prohibited anticompetitive behavior will be left remediless. Different future victims, learning that lesson, will not litigate without a remedy. They also will be left to ponder the coherence of a legal order that allows federal rules governing local government activity to be changed retroactively by the State.

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were pre-existing and not retroactive, and on the secondary ground that they involved transportation in territory exclusively within the legislative power of the local government at the time of the monopoly contract. *Executive Town & Country Services v. City of Atlanta*, 789 F.2d 1523, 1525, 1529 (11th Cir. 1986); *Commuter Transportation Systems v. Hillsborough County Aviation Authority*, 801 F.2d 1286, 1288 (11th Cir. 1986); *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 95, 96 (2d Cir. 1985), *cert. den.*, ___U.S. ___(1986); *Golden State Transit v. City of Los Angeles*, 726 F.2d 1430, 1434 (9th Cir. 1984), *rev'd on other grounds*, 88 L.Ed.2d 616 (1986).

The policies at stake here are the same as, yet the converse of, those in *Mitchell v. Forsyth*, 453 U.S. 913 (1985). That decision restates that in order to overcome a defense of qualified immunity, the plaintiff must establish "*the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions. . . .*" (emphasis added), 105 S.Ct. at 2816. For analogous policy reasons necessary to a fundamental legal order, to practical administration, and to federalism, the petitioners respectfully urge that this Court expressly state that a local government, in order to invoke the state action defense, must show that the "clearly articulated and affirmatively expressed state policy" was in existence "at the time of the challenged actions." *Cf. Huron Valley Hospital v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986).

II. CONGRESS INTENDED THAT THE GRANT OF RETROACTIVE IMMUNITY TO LOCAL GOVERNMENTS FROM THE DAMAGE REMEDY BE CONDITIONED UPON THE EXISTENCE OF ALTERNATIVE EQUITABLE RELIEF AGAINST THE LOCAL GOVERNMENT, AND NOT UPON ALTERNATIVE NON-EXISTENT RELIEF AGAINST PRIVATE DEFENDANTS.

The Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (Oct. 24, 1984), states, in relevant part, in sections 3(a) and (b):

> (a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

> (b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

15 U.S.C. §35 (Supp. III, 1985).

The district court invoked section 3(b) as an alternative ground for dismissal of damages remedies against the local government defendants. The standard endorsed by the Fifth Circuit is not the most easily understood:

> '[A]s either of the two factors . . . stage of litigation and availability of alternative relief under the Clayton Act . . . moves towards weighing against retroactive application, the defendant's burden to establish that denial of such application would be inequitable becomes more difficult.' 801 F.2d at 165 (citation omitted).

Even aside from the district court's hostile, inequitable characterization of the stage of the litigation here,[2] the Fifth Circuit employed an erroneous legal

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[2] Mechanically it is true that discovery on the merits had not been completed in 1985. However, after Judge Higginbotham's

standard by weighing alternative relief against private defendants as a ground for denying total relief against the government defendants (801 F.2d at 167):

> '[I]n looking to the availability of alternative relief under the Clayton Act, the court would assess whether a plaintiff could recover damages from a private party and whether an injunction would be sufficient to halt continuing injury caused by an ongoing antitrust violation.' (citation omitted). . . .
>
> Both criteria are met in these cases.[2] Each case has three defendants which are not local governments—Surtran Taxicabs, Yellow Cab of Dallas, and Fort Worth Cab & Baggage Co.—and which could be held liable for money damages, if not otherwise exempt from the antitrust laws.

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major ruling in 1978, substantial discovery had been taken for the class certification hearing, generating a seven volume record. Since 1979, Judge Robinson had stayed discovery on the merits, and resisted the Whortons' attempts to bring the case to jury trial, including their Pyrrhic victory on the first appeal. *Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324 (5th Cir. 1982). In the interim, defendants were benefited by the 1983 state legislation validating their contracts, and the 1984 federal immunity legislation. *Compare, Miami Intern. Realty v. Town of Mt. Crested Butte*, 607 F. Supp 448 at 453 (D. Colo. 1985). Similarly, the district court's opinion, as endorsed by the Fifth Circuit, on summary judgment mechanically found and endorsed the defendants' version of the facts, including the abstract label "single operator concept" and did not report or analyze the record evidence raising factual questions under the sham bidding exception to *Noerr-Pennington*.

> [2] As an alternative ground for dismissal, this analysis proceeds as though the state action exemption did not apply, thus making the availability of alternative relief a reality. (801 F.2d 167).

This standard is based upon Senator Cranston's remarks made on October 4, 1984. 130 Cong. Rec. S13,105 (daily ed. Oct. 4, 1984). Senator Cranston was not a Senate conference manager. Senator Metzenbaum was a Senate manager and stated on October 11, 1984:

> None of those House Members and none of us here in the Senate have the authority, have the strength, have the legal right to change the legal effect of what the conferees concluded in their language, nor can we change the statement of the managers. Only the statement of the managers accurately reflects the congressional intent in this area, and there is no way of changing that.

130 Cong. Rec. S14,368 (daily ed. Oct. 11, 1984) (statement of Sen. Metzenbaum).

As extracted from the House Conference Report dated October 10, 1984, (H. R. Rep. No. 98-1158 at 3 (Oct. 10, 1984), U.S. Code Cong. & Admin. News 1984 at 4602, 4626-27), the proper standard of law is stated in *Miami Intern. Realty v. Town of Mt. Crested Butte*, 607 F. Supp. 448, at 454 (D. Colo. 1985):

> The legislative history clearly indicates that Congress contemplated that relevant alternative remedies would consist solely of Clayton Act injunctive relief against the municipal defendant, rather than damage relief from other private defendants.

The legislative history and language of section 3(b) contemplate a sensitive balancing, according to traditional equity principles. See Mayo, *The Local Government Antitrust Act, A Comment on the Constitutional Questions*, 50 J. Air L. & Com. 805, 811 (1985). Even if alternative relief against private defendants can be weighed, traditional equitable principles are perverted when, as here, the Fifth Circuit affirmatively weighed nonexistent remedies against the private defendants.

The district court's opinion also fairly implied the court would allow no retrospective equitable monetary relief for past injuries. 801 F.2d at 167 and 168. However, the Act requires the local government to show the retroactive bar of the treble damage remedy would not be "inequitable." The maxim is not yet dead that "[h]e who seeks equity, must do equity." Z. CHAFFEE JR. & E. RE, EQUITY 11 (5th ed. 1967). By placing the affirmative burden on the local government to show that denial of the damage remedy would be "[ ]equitable," Congress incorporated this equitable maxim that the court may provide retrospective equitable relief against the government as a condition of granting it affirmative equitable relief, *i.e.* here, immunity from treble damages. See *Ehrlich v. United States*, 252 F.2d 772 at 776 (5th Cir. 1958) (Wisdom, J.). The proper construction of the Local Government Antitrust Act would be to fashion an appropriate retrospective equitable remedy against the local government as an equitable condition to the retroactive grant of immunity from the damages remedy. See *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 250-51, (3d Cir.), *cert. den.*, 421 U.S. 1011 (1975). This statutory solution is preferable because, it is sub-

mitted, the Eleventh Amendment is not implicated. *Cf. Green v. Mansour*, 106 S.Ct. 423 (1985).

The retroactive test for state policy and denial of retrospective equitable relief against the local governments, based upon non-existent alternative remedies applicable to private defendants combine to create a result that Congress did not intend. Congress did not intend that cities and private defendants should be able to engage in antitrust violations for a five year period, and then when challenged in federal court, to cease the practice and to obtain state legislation retroactively validating the violations, and thereby to escape all liability and leave the victims remediless.

CONCLUSION

Local governments do not have sovereign immunity from liability and from federal court remedies under anti-trust laws. However, since the date of the Local Government Antitrust Act and *Town of Hallie*, the federal courts have swung the pendulum almost to the point of automatic immunity. The Fifth Circuit's endorsement of a retroactive rule for measuring state policy and its approval of a principle denying retrospective equitable relief on grounds of non-existent alternative private relief as a practical matter have reached that extreme. If the Court wants to draw a balance point short of per se immunity, this case presents just cause.

For these reasons, petitioners respectfully request this petition for writ of certiorari be granted.

Respectfully submitted,

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Date: December 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1564

JOHN WOOLEN, *et al.*,
Plaintiffs,
JOHN D. CAMPISI, Individually and as Class Action Plaintiffs, *et al.*,
Plaintiffs-Appellants,
and
CARL WHORTON, *et al.*,
Intervenors-Appellants,
v.

SURTRAN TAXICABS, INC., *et al.*,
Defendants-Appellees.

KEN WHORTON, *et al.*,
Plaintiffs-Appellants,
v.

CITY OF DALLAS, TEXAS, *et al.*,
Defendants-Appellees.

OPINION

Filed September 26, 1986

Before: Thomas Gibbs Gee, Carolyn Dineen Randall and W. Eugene Davis, Circuit Judges.

Per Curiam

Appeals from the United States District Court
for the Northern District of Texas
Mary Lou Robinson, District Judge, Presiding

OPINION

PER CURIAM:

We affirm the judgment of the district court on the basis of its careful opinion which is attached as Appendix A.

AFFIRMED.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION NO. 3-78-609
CONSOLIDATED WITH:
CIVIL ACTION NO. 3-78-745

JOHN WOOLEN, *et al.*,

Plaintiffs,

VS.

SURTRAN TAXICABS, INC., *et al.*,

Defendants.

ORDER

The factual allegations in these antitrust actions have already been reported twice and need not be repeated at length here. See *Woolen v. Surtran Taxicabs*, 461 F.Supp. 1025 (N.D. Tex. 1978) (denying motions to dismiss); *Woolen v. Surtran Taxicabs*, 684 F.2d 324 (5th Cir. 1982) (vacating order denying intervention). In a nutshell, the plaintiff taxicab drivers claim that the defendants have excluded them from the outbound taxicab market at the Dallas/Fort Worth Regional Airport since the airport's opening in 1974, in violation of the Sherman Act.

Recent antitrust law developments, most notably passage of the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (Oct. 24, 1984) (to be codified in 15 U.S.C. § 35), and the recent decisions in *Town of*

Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985); *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721 (1985); and *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir. 1985), now require that three issues be addressed, including one previously decided in the original district court opinion in this case:[1]

I. Should these consolidated actions be dismissed because the Defendants' challenged activities are immune from scrutiny under the antitrust laws by virtue of the state action exemption?

II. Should the Plaintiffs' claims under § 4 of the Clayton Act for damages, interest on damages, costs and attorney's fees against the defendant cities be dismissed under § 3 of the Local Government Antitrust Act of 1984?

III. Should the Plaintiffs' claims against the private taxi company defendants be dismissed as barred under the *Noerr-Pennington* doctrine?

For the reasons set forth below, the Court answers each question in the affirmative.

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[1] After these actions were filed in 1978, all defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, each asserting the state action exemption. These motions to dismiss were denied in the original district court opinion, 461 F.Supp. at 1031-33. On May 24, 1985, the Court issued an Order stating that it would reconsider these motions in light of subsequent authority. All parties submitted new briefs. On June 28, 1985, the private defendants—Surtran Taxicabs, Inc., Yellow Cab of Dallas, Inc., and Fort Worth Cab & Baggage Company, Inc.—moved for summary judgment under Rule 56, asserting the state action exemption and *Noerr-Pennington* immunity.

The issues concerning the Local Government Antitrust Act of 1984 were raised by the Court in an Order issued December 6, 1984. In response to that Order, each party filed papers addressing the applicability of the Act's provisions.

I. The State Action Exemption

A. The Municipal Defendants

In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court, relying on principles of federalism and state sovereignty, determined that the Sherman Act does not apply to the anticompetitive conduct of a state acting through its legislature. *Id.* at 350-51. Thirty-five years later, the Court also held that municipalities are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978). These actions were filed shortly after *City of Lafayette* was decided.

City of Lafayette did not completely prohibit municipalities from claiming the state action exemption. Instead, the plurality opinion suggested that the state action doctrine "exempts only anticompetitive conduct engaged in as an act of government . . . [by a political subdivision of the state] pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413. The opinion went on to explain:

> This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense . . . [A]n adequate state mandate for anticompetitive activities . . . exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated that kind of action complained of."

435 U.S. at 419 (citation omitted). Finally, "*City of Lafayette* suggested, without deciding the issue, that it would be sufficient to obtain *Parker* immunity for a municipality to show that it acted pursuant to a 'clearly articulated and affirmatively expressed . . . state policy' that was 'ac-

tively supervised' by the State." *Town of Hallie,* 105 S. Ct. at 1717, quoting *City of Lafayette,* 435 U.S. at 410.

Considerable debate ensued over what would constitute an adequate articulation and expression of state policy, and what would constitute active supervision. In *Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982), the Court held that a home rule provision of the Colorado Constitution which allocated only the most general authority to municipalities to govern local affairs did not satisfy the clear articulation component of the state action test. The opinion also suggested that whether active supervision by the state of the anticompetitive conduct was required was an open question, despite the plurality opinion in *City of Lafayette.* 455 U.S. at 51-52, n.14.

Noting that "[i]t is fair to say that our cases have not been entirely clear," 105 S.Ct. at 1720, the Court resolved much of the debate in *Town of Hallie.* A unanimous Court reiterated that the state action exemption applies whenever the state legislature has "clearly articulated and affirmatively expressed" a state policy to displace competition in the regulated area. *Id.* at 1719. The Court further held that "although compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to a clearly articulated state policy." *Id.* Finally, the Court concluded that the "active state supervision requirement should not be imposed in cases in which the actor is a municipality." *Id.*

The Fifth Circuit has applied *Town of Hallie* in a case which is virtually indistinguishable from the instant actions. In *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.,* 760 F.2d 607 (5th Cir. 1985), the City of Houston had entered into a contract with the Greater Houston Transportation Corporation by which the City granted an exclusive concession over passenger service at Houston Intercontinental Airport. Two

groups of taxicab owners and operators filed suit under the Sherman and Clayton Acts, seeking damages and injunctive relief from the City and its private contractor. The district court dismissed the complaint on defendants' motion for summary judgment, holding that the City was immune from antitrust scrutiny under the state action exemption and that the private contractor was immune under the *Noerr-Pennington* doctrine. The Fifth Circuit affirmed.

The Court's analysis focused on the relevant provision of the Texas Municipal Airport Act, which authorizes municipalities to establish and operate airports both within and without their boundaries. Article 46d-4 provides:

> (a) In operating an airport . . . such municipality may . . . enter into contracts . . . and other arrangement for a term not exceeding forty (40) years with any persons:
>
> . . .
>
> (2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport. . . .
>
> . . .
>
> In each case the municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services. . . .

Tex. Rev. Civ. Stat. Ann. art. 46d-4 (Vernon 1969). The Fifth Circuit said:

> While the latter provision falls short of expressly mentioning the establishment of ground transportation services, the statute's broad phrasing is a strong indication of the state's desire to abdicate in favor of municipal prescience with regard to airport management.
>
> This indication is all we require. . . . We think it . . . clear that the City of Houston might deem

> it most efficient to confer the privilege of airport taxicab operation on a single company, and that such a decision is a logical or reasonable consequence of the state's broad allocation of authority to the City to run its own airport.

760 F.2d at 610-11. The Fifth Circuit also disposed of the question concerning the impact of Article 46d-7(c)—a major stumbling block in the first district court opinion in this case, *see* 461 F.Supp. at 1031:

> Similarly, it is of limited significance that the statute authorizing municipal airport management states that the municipality's actions shall not be "inconsistent with, or contrary to, any Act of the Congress of the United States. . . ." [Article 46d-7(c).] The relevant question is not whether the City has transgressed federal law, but whether the Sherman & Clayton Acts apply to the City at all.

760 F.2d at 612, n.8.

Plaintiffs seek to distinguish *Independent Taxicab* on two grounds: (1) Houston Intercontinental is wholly owned and operated by the City of Houston, whereas the Dallas/Fort Worth Regional Airport is jointly owned and operated by the Cities of Dallas and Fort Worth, and (2) recent statutory amendments demonstrate that taxicab operations at jointly owned and operated airports were in a "regulatory void" until 1983.

The first argument is of no import. The Cities of Dallas and Fort Worth operate the airport through the Dallas/Fort Worth Regional Airport Board, a joint board created under § 14 of the Municipal Airport Act, Article 46d-14. That section provides, in relevant part:

> (a) For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality. . . .

> (b) Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint . . . operation of airports. . . . Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. . . .
>
> (c) . . . The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport . . . to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport. . . .

The Regional Airport Board is designed as a mechanism for joint action. That the defendant cities in these actions operated through the Regional Airport Board on a jointly owned airport, instead of on their own on individually owned airports, does not affect their state action exemption. "[T]he state's desire to abdicate in favor of municipal prescience with regard to airport management" is equally clear in both instances. The decision to grant an exclusive airport taxicab franchise—to utilize the "single-operator concept," in the parlance of these actions—is a logical and reasonable consequence of the State's broad allocation of authority to cities to jointly acquire, own and operate municipal airports.

Defendants second argument is based on legislation passed in 1983. The Obstruction to Air Navigation Control and Taxicab Licensing Act, 1983 Tex. Gen. Laws, ch. 626, at 4015, amended § 14 of the Municipal Airport Act to provide that:

> (d)(6) Taxicab Licensing. . . . [A] joint airport board . . . shall have power to license taxicabs picking up passengers at or delivering passengers to the airport.
>
> (7) Regulations. Any resolution, rules, regulations, or orders of the joint airport board dealing with subjects authorized by Subdivision (65) of this subsection become effective only upon approval of the governing bodies of the constituent public agencies.

Article 46d-14(d)(6)-(7) (Vernon Supp. 1985). While this statute was not enacted until well after the bulk of the actions challenged in these suits, it is significant as an indication of state policy, particularly when read in conjunction with § 2 of the Municipal Airport Act Amendments of 1983, 1983 Tex. Gen. Laws, ch. 978, at 5322, which provides:

> Any and all contracts, leases, or other arrangements for the use or occupancy of airport property executed by joint boards created under the Municipal Airports Act (Article 46d-1 et seq., Vernon's Texas Civil Statutes), and all provisions thereof, and executed prior to the effective date of this Act, are hereby validated and confirmed and the same are fully effective and represent the lawful agreements and undertakings of joint boards in accordance with the terms thereof.

From these enactments, Plaintiffs draw the conclusion that no governmental entity had any power to regulate taxicab service at the airport until September of 1983. The opposite is true.

The amendment to § 14 of the Municipal Airport Act was designed to clarify the role of joint airport boards in regulating taxicab service at joint airports because of uncertainties that might have arisen from concurrent legis-

lation which clarified the role of the Railroad Commission in establishing licensing requirements under the Motor Bus Act, Article 911a. See 1983 Tex. Gen. Laws, ch. 263, at 1161. This clarifying legislation does not suggest that no power to regulate existed before its enactment. The validating statute suggests just the opposite.

The plaintiffs' operations at the airport were limited because ground transportation service was provided by means of a single-operator concept. The Cities of Dallas and Fort Worth own the airport and, as noted above, operate it through the Dallas/Fort Worth Regional Airport Board. The Cities of Dallas and Fort Worth contracted with the Airport Board to provide ground transportation under the single-operator concept. To meet their obligations to the Board, the Cities of Dallas and Fort Worth formed an entity known as the D/FW Surtran System. The System then solicited bids for the provision of the taxicab component of the ground transportation services. Yellow Cab of Dallas and Fort Worth Cab & Baggage formed an entity known as Surtran Taxicab, Inc., which submitted the winning bid. The D/FW Surtran System then contracted with Surtran Taxicab, Inc., for the provision of taxicab service at the airport. The single-operator concept, then, originated in the first agreement between the Airport Board and the Cities of Dallas and Fort Worth. The 1983 validation statute confirms that, under state law, the single-operator concept was lawful.

For purposes of antitrust analysis, the validation statute itself, by validating and confirming the contracts in question, is an adequate indication of the state's desire to allow joint airport boards to displace competition through anticompetitive measures in the area of taxicab services to municipal airports.

The Court concludes that Plaintiffs' actions against the Cities of Dallas, Fort Worth, Grapevine and Irving should be dismissed because the challenged conduct is immune

from scrutiny under the antitrust laws by virtue of the state action exemption.

B. The Private Defendants

In a companion case to *Town of Hallie*, the Supreme Court outlined the criteria a private party must satisfy to fall within the state action exemption. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.' Second, the State must supervise actively any private anticompetitive conduct." *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721, 1727 (1985) (citations omitted). The Court explained the reason for extending the state action exemption to private parties:

> The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate domestic commerce. If *Parker* immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a State would be unable to implement programs that restrain competition among private parties. A plaintiff could frustrate any such programs merely by filing suit against the regulated private parties, rather than the state officials who implement the plan. We decline to reduce *Parker*'s holding to a formalism that would stand for little more than the proposition that Porter Brown sued the wrong parties.

Id. at 1726-27. Instead, "[t]he success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant." *Id.* at 1728.

The private defendants have met the first prong of the test. As discussed above, the single-operator concept re-

sulted from the state's clearly articulated and affirmatively expressed "desire to abdicate in favor of municipal prescience with regard to airport managment." 760 F.2d at 610. Because the Cities of Dallas and Fort Worth determined that the single-operator concept would be used at the airport and solicited bids only on this basis, it is fair to say that the private defendants, who simply submitted a bid, were compelled to participate in the anticompetitive activity if they wanted to provide taxicab service at the airport. As the Court said in *Southern Motor Carriers*, "compulsion often is the best evidence that the State has a clearly articulated and affirmatively expressed policy to displace competition." 105 S.Ct. at 1729.

The active supervision requirement—the second prong of the test—"prevents the state from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." *Id.* at 1729, quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). "[T]he state supervision requirement is intended to control the potential for abuse created by authorizing private persons to make anticompetitive decisions and to insure that those decisions are consistent with the clearly articulated and affirmatively expressed state policy at stake." *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1014 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 1864 (1985).

Midcal involved a challenge to a California wholesale wine pricing system that the Court found resulted in a de facto resale price maintenance program. The Court held that the system was a clearly articulated state policy, but that it did not meet the active supervision requirement:

> The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor

> does it regulate the terms of fair trade contracts. The States does not monitor market conditions or engage in any "pointed reexamination" of the program.

455 U.S. at 105-106.

In the instant actions, there is no doubt that the Cities of Dallas and Fort Worth, and the Regional Airport Board, have actively supervised the private defendants' conduct. The details of taxicab service at the airport are set forth comprehensively in the contracts between D/FW Surtran System and Surtran Taxicabs, Inc., attached to the complaints. Further, the successive contracts show a gradually changing approach to ground transportation at the airport. For example, the 1979 Contract allows Surtran Taxicabs to subcontract with other taxicab companies for provision of service at the airport.

The Court concludes that the Plaintiffs' actions against the private defendants should be dismissed because the challenged conduct is immune from scrutiny under the antitrust laws by virtue of the state action exemption.

II. The Local Government Antitrust Act of 1984

The second question before the Court is whether the plaintiffs' claims for damages, interest on damages, costs and attorney's fees against the cities should, in the alternative, be dismissed under § 3 of the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (Oct. 24, 1984) (to be codified in 15 U.S.C. § 35), which provides:

> (a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

> (b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

Section 3(b) of the Act "was a compromise between those Congressmen who thought that retroactive application was not in accord with Congress' traditional approach to changing existing law and those who felt that denial of retroactive application would unjustly penalize those localities that were defendants in pending suits for treble damages." *Jefferson Disposal Co. v. Parish of Jefferson,* 603 F.Supp. 1125, 1131 (E.D. La. 1985).

There is no dispute that these cases were commenced before the effective date of the act and that the cities of Dallas, Fort Worth, Grapevine and Irving are local governments within the meaning of § 2(1)(A) of the Act, 15 U.S.C. § 34(1)(A). The question, then, is whether it would be inequitable not to apply § 3(a) retroactively on the facts of these cases.

The Joint Explanatory Statement of the Conference Committee, which accompanied the Conference Report on the Bill, discusses the application of the Act to pending cases:

> The application to pending cases of the money damage protection afforded by § 3 will be based upon a case-by-case determination by the district court. The local government has the burden of proof to establish to the court's satisfaction that

> it would be inequitable not to apply this Act to the pending case. The court is to consider all relevant circumstances. The statute mentions two of the factors that the court should consider—stage of litigation and the availability of alternative relief under the Clayton Act. Where a pending case is in an early stage of litigation and where injunctive relief can remedy the problem, the defendant local government may be able more easily to sustain its burden. Where a case is in more advanced stages of litigation or where injunctive relief is unavailable or incomplete, the burden would become more difficult. If a case has progressed to or beyond a jury verdict or district court judgment, a local government defendant would need compelling equities on its side to justify the application of this section to the pending case.

Conference Report of H.R. 6027, 98th Cong., 2d Sess., 130 Cong. Rec. H11,850-51 (daily ed. Oct. 10, 1984). "This Statement makes clear that as either of the two factors specifically mentioned in § 3(b) of the Act (stage of litigation and availability of alternative relief under the Clayton Act) moves towards weighing against retroactive application, the defendant's burden to establish that denial of such application would be inequitable becomes more difficult." *Jefferson Disposal,* 603 F.Supp. at 1132.

In addition to the two factors listed in the statute—the stage of the litigation and the availability of alternative relief under the Clayton Act—the legislative history indicates that the Court should expressly consider at least three other factors in deciding the equity question:

> In making its determination as to whether a local government should be protected against damages in a currently pending case, however, the statement of managers specifically directs the court

> to consider all relevant circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act—that is, the injunction remedy. But public policy requires that the court's inquiry in such instances must not be limited solely to antitrust considerations in cases brought against local governments. Among the other relevant factors, the court should properly consider:
>
> First, whether the local government was acting within its normal legislative, regulatory, executive, administrative, or judicial authority;
>
> [S]econd, the financial harm which a treble damage award could inflict on the municipality and its taxpayers; and
>
> [T]hird, whether the municipal action was predicated on or in furtherance of Federal or State laws, policies or regulations.

130 Cong. Rec. H12,187 (daily ed. Oct. 11, 1984) (remarks of Rep. Fish). *Accord, id.* at H12,184 (remarks of Rep. Lungren). *But see id.* at S14,368 (remarks of Sen. Metzenbaum), *reprinted in Miami International Realty Co. v. Town of Mt. Crested Butte*, 607 F.Supp. 448, 452 n.2 (D. Colo. 1985) (additional factors suggested on the House floor do not reflect Congressional intent). The Court will consider the statutory factors first, then those suggested by the legislative debates.

The Stage of Litigation. This litigation is now seven years old, but chronological age is deceptive in this instance. These suits were filed in May and June of 1978. The initial motions to dismiss were filed on November 29, 1978. Discovery then went forward on the class certification issues, and on the merits from February, 1979, forward. The class certification hearing was held in October 1979. The Court's ruling on class certification was issued

December 31, 1980. Both cases were essentially dormant during the period the Court had the class certification issues under advisement.

The December 31, 1980, Order also denied the motion to intervene in the *Campisi (Woolen)* suit, which had been filed by some of the *Whorton* plaintiffs. Those plaintiffs appealed in January 1981. The Fifth Circuit's opinion was issued on August 30, 1982. The mandate was filed in the district court on September 27, 1982. No proceedings, other than those related to the appeal, took place during the pendency of the appeal.

After this case was remanded, the *Campisi* plaintiffs moved to modify the class certification order to certify a damages class and the *Whorton* plaintiffs moved to decertify the class. All parties filed statements concerning the future course this litigation should take. In the ensuing 2 1/2 years, though, no party has made any real effort to complete discovery and ready the case for trial on the merits.

The past 5 1/2 years has not been devoted to preparation for trial on the merits. Completion of pretrial discovery would take at least another year. Because the status of these actions has not changed since the effective date of the Act, the Court need not determine whether the appropriate date for assessing the stage of the litigation is the date of this Opinion or the date the Act took effect, September 24, 1984—30 days before its date of enactment under § 6 of the Act. *See Jefferson Disposal*, 603 F.Supp. at 1132 n.16.

The failure to complete pretrial discovery before the effective date of the Act is a significant indication that § 3(a) should be applied retroactively. *See* 130 Cong. Rec. H12,186 (daily ed. Oct. 11, 1984) (remarks of Rep. Hyde) (the fact that pretrial discovery has not been completed "is an important distinction between the first and second sentences of section 3(b) for purposes of retroactive ap-

plication"); *id.* at H12,187 (remarks of Rep. Rodino) (uncompleted pretrial discovery "is the essential difference made in the conference report between pending cases generally, and pending cases where a jury verdict or district court decision has been rendered.") Congressman Hyde and Rodino were floor managers for the Act. Their statements during the course of debate are particularly useful in determining Congress' intent. *Miami International Realty*, 607 F.Supp. at 452 n.2. The failure to complete discovery before the effective date of the Act has particular weight where, as here, major discovery remains to be conducted.

The Availability of Alternative Relief Under the Clayton Act. "[I]n looking to the availability of alternative relief under the Clayton Act, the court would assess whether a plaintiff could recover damages from a private party and whether an injunction would be sufficient to halt continuing injury caused by an ongoing antitrust violation." 130 Cong. Rec. S13,105 (daily ed. Oct. 4, 1984) (remarks of Sen. Cranston). *Contra Miami International Realty*, 607 F.Supp. at 454 ("the potential damage liability of other defendants should not enter into the calculus used in determining whether to apply § 3 to pending cases").

Both criteria are met in these cases.[2] Each case has three defendants which are not local governments—Surtran Taxicabs, Yellow Cab of Dallas, and Fort Worth Cab & Baggage Co.—and which could be held liable for money damages, if not otherwise exempt from the antitrust laws.

Any continuing injury could be halted with injunctive relief prohibiting the cities from excluding the plaintiffs from the outbound taxicab market at the airport, or other appropriate prohibitions. "Injunctive remedies under § 16

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[2] As an alternative ground for dismissal, this analysis proceeds as though the state action exemption did not apply, thus making the availability of alternative relief a reality.

[of the Clayton Act] may be as broad as necessary to ensure that 'threatened loss or damage' does not materialize or that prior violations do not recur." *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 925 (9th Cir. 1975).

Exercise of Normal Regulatory Authority & Action in Furtherance of State Law. As discussed in Part I of this Opinion, the cities were plainly exercising their normal regulatory authority and acting in furtherance of state law in their implementation of taxicab service at the airport.

Financial Harm of a Treble Damages Award. The combined actions seek actual damages of $7,000,000, which would be trebled to $21,000,000. Such an award inevitably would have an adverse impact even on these major cities, but they would not be crippled in their provision of services or forced into bankruptcy. The burden would also be shared by the three nonmunicipal defendants. The magnitude of any adverse consequences falls far short of those suggested as benchmarks in the House:

> [W]hether an adverse impact would be felt by the unit of local government and its residents because of the antitrust damage award . . . is important because certainly we do not want the antitrust laws of our country to result in insolvency with respect to our local governments, nor to intrude in such a way on local government that we do not have people coming forth to serve on local government out of fear of potential antitrust suits.

130 Cong. Rec. H12,184 (daily ed. Oct. 11, 1984) (remarks of Rep. Lungren). At the same time, "[i]t cannot be denied that a judgment of that magnitude would have an adverse impact on any community in this country and would be totally at odds with the spirit and intent of the Act." *Jefferson Disposal,* 603 F.Supp. at 1135.

Conclusion. The Court determines, in light of all the circumstances, that it would be inequitable not be apply § 3(a) of the Local Government Antitrust Act of 1984, 15 U.S.C. § 35(a), to this case. Plaintiffs' claims under § 4 of the Clayton Act, 15 U.S.C. § 15, for damages, interest on damages, costs, and attorney's fees against the Cities of Dallas, Fort Worth, Grapevine and Irving are dismissed on this additional ground. This dismissal does not affect Plaintiffs' claims for costs and attorney's fees under § 16 of the Clayton Act, 15 U.S.C. § 26, as the Act does not encompass them. *Jefferson Disposal,* 603 F.Supp. at 1133 n. 19.

Under the express language of § 4(b) of the Act, the relief provided to private litigants is not available to the private defendants in these actions because they were commenced before the effective date of the Act.

III. Noerr-Pennington

The private defendants have moved for summary judgment on the ground that their activities are immune from antitrust scrutiny under the *Noerr-Pennington* doctrine. See *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965).

"The *Noerr-Pennington* doctrine provides an exception to antitrust liability enabling citizens or business entities to influence or to petition public officials to take official action that will harm or eliminate competition." *Affiliated Capital Corp. v. City of Houston,* 735 F.2d 1555, 1566 (5th Cir. 1984) (en banc), *petition for cert. filed,* 105 S. Ct. 1164 (1984). The *Noerr-Pennington* doctrine stems from the First Amendment's guarantee of a right to assemble and petition the government. "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme,

itself violative of the Sherman Act." *Pennington*, 381 U.S. at 670. As the Court later said:

> [I]t would be destructive of rights of association and of petition to hold that groups with common interest may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interest vis-a-vis their competitors.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972).

However, "a defendant cannot rely on *Noerr-Pennington* immunity when the activity to influence government action is a mere sham to hide what is essentially an attempt to interfere with a competitor's business." *Affiliated Capital*, 735 F.2d at 1567. This sham exception may manifest itself in a variety of ways. *See Coastal States Marketing v. Hunt*, 694 F.2d 1358, 1371 n.42 (5th Cir. 1983); ABA Antitrust Section, Antitrust Law Developments 615-18 (2d ed. 1984). The plaintiffs in the instant actions have not suggested what variety of the sham exception they believe is applicable here.

Recognizing that "[a petitioning party] should enjoy petitioning immunity from the antitrust laws so long as a genuine desire for [governmental] relief is a significant motivating factor underlying [the petitioning activity]," the Fifth Circuit has said that the sham exception is initially established by a showing that the defendant's petitioning activity was "substantially" motivated by impermissible anticompetitive factors. If this showing is made, the defendant must demonstrate to the satisfaction of the trier of fact that the defendant's petitioning activity was "substantially" motivated by a hope of governmental relief. If the defendant discharges this burden, "[n]othing more is

required to bring the case within the immunity." *Coastal States Marketing,* 694 F.2d at 1372 & n.45.

The summary judgment record in this case discloses no genuine issue as to any facts material to determination of the *Noerr-Pennington* question. The undisputed facts demonstrate that the private defendants are entitled to summary judgment by virtue of the *Noerr-Pennington* doctrine. The same comments made by the Fifth Circuit in *Independent Taxicab* apply here:

> Viewing the record in the light most favorable to [plaintiffs], the most that can be said is that [the private defendants] secured from the [Regional Airport Board] an exclusive concession whose anticompetitive effects stem primarily from a valid municipal, and vicariously state, policy. It would be anomalous to hold on the one hand that government can contract with private entities to effectuate valid, albeit anticompetitive, policies, while holding on the other hand that private entities cannot petition government to participate in the public endeavor.

760 F.2d at 613.

> This result is compelled if *Noerr-Pennington* protection is to have meaning in the context of agreements with the government. First Amendment petitioning privileges would indeed be hollow if upon achieving a petitioned-for end the petitioner were then subjected to antitrust liability for his success.

Greenwood Utilities Commission v. Mississippi Power Company, 751 F.2d 1484, 1505 (5th Cir. 1985).

The single-operator concept, which is at the heart of Plaintiffs' claims, apparently originated in an independent consultant's report prepared for the Cities of Dallas and Fort Worth in 1964. Even if the private defendants ac-

tively lobbied for implementation of the single-operator concept and vigorously pressed their views concerning criteria the successful bidder would have to meet in such areas as minimum insurance coverage and fleet size, *Noerr-Pennington* would apply because these activities plainly were not a sham. Plaintiffs' alleged injuries were caused by the governmental action which the private defendants genuinely attempted to secure and succeeded in securing. *See In re Airport Car Rental Antitrust Litigation,* 521 F.Supp. 568, 587-90 (N.D. Cal. 1981), *aff'd,* 693 F.2d 84 (9th Cir. 1982), *cert. denied,* 103 S.Ct. 3114 (1983).

Plaintiffs' contention that the private defendants' actions fall within the co-conspirator exception to the *Noerr-Pennington* doctrine is without merit. Viewing the summary judgment record in the light most favorable to plaintiffs, the most that has been shown is mere adoption by the cities of some of the private defendants' proposals. The record shows that while some of the private defendants' suggestions were adopted, the general concept and specific details of taxicab service at the airport were closely scrutinized and extensively debated by a variety of public and private entities. There is no evidence of a conspiracy. See *Affiliated Capital Corp. v. City of Houston,* 519 F.Supp. 991, 1016-23 (S.D. Tex. 1981), *adopted in relevant part,* 735 F.2d at 1567 (applying co-conspirator exception where the evidence revealed "active participation and orchestration by public officials in an anticompetitive agreement").

The Court concludes that the plaintiffs' claims against the private defendants should also be dismissed as barred under the *Noerr-Pennington* doctrine.

IV. The Civil Rights Claim

In their First Amended Complaint, filed May 17, 1985, the *Whorton* plaintiffs allege that the defendants' conduct constituted "a discrimination against the rights of the Plaintiffs under the Civil Rights Act and the Constitution

of the United States." *Id.* ¶ 17, at 9. The *Whorton* plaintiffs have not further elaborated on this cause of action in any document filed with the Court, nor have they identified what statute they purport to sue under.

This alleged civil rights claim based on discrimination has no plausible foundation and is wholly insubstantial and frivolous. It is dismissed for want of subject matter jurisdiction. Rule 12(b)(1). *See Williamson v. Tucker,* 632 F.2d 579, 590-91 (5th Cir. 1980) (discussion of applicable standards). In the alternative, the civil rights claim is dismissed for failure to state a claim upon which relief can be granted. Rule 12(b)(6).

V. Summary of Holdings

1. Plaintiffs' antitrust claims are DISMISSED because the Defendants' challenged activities are immune from scrutiny under the antitrust laws by virtue of the state action exemption.

2. Plaintiffs' antitrust claims under § 4 of the Clayton Act for damages, interest on damages, costs and attorney's fees against the Defendant cities are DISMISSED under § 3 of the Local Government Antitrust Act of 1984 because, in light of all the circumstances, it would be inequitable not to apply § 3(a) of the Act to this case.

3. Plaintiffs' antitrust claims against the private Defendants are DISMISSED as barred under the *Noerr-Pennington* doctrine.

4. The *Whorton* Plaintiffs' civil rights claim is DISMISSED for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

5. This Order disposes of all pending claims in this litigation. Judgment will be entered accordingly.

It is so ORDERED.

ENTERED this 8th day of August, 1985.

/s/ MARY LOU ROBINSON
MARY LOU ROBINSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-78-609
CONSOLIDATED WITH:
CIVIL ACTION NO. CA-3-78-745

JOHN WOOLEN, *et al.*

Plaintiffs,

v.

SURTRAN TAXICABS, INC., *et al.*,

Defendants.

FILED
AUG 8 1985

ORDER OF DISMISSAL

Civil action nos. 3-78-609 and 3-78-745 are dismissed.

It is so ORDERED.

ENTERED this 8th day of August, 1985.

/s/ MARY LOU ROBINSON
MARY LOU ROBINSON
United States District Judge

APPENDIX B

LOCAL GOVERNMENT ANTITRUST ACT OF 1984

PUBLIC LAW 98-544 [H.R. 6027]; October 24, 1984

LOCAL GOVERNMENT ANTITRUST ACT OF 1984

For Legislative History of Act, see Pamphlet No. 10A
An Act to clarify the application of the Clayton Act to the official conduct of local government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Local Government Antitrust Act of 1984".

SEC. 2. For purposes of this Act—

(1) the term "local government" means—

(A) a city,county, parish, town, township, village, or any other general function governmental unit established by State law, or

(B) a school district, sanitary district, or any other special function governmental unit established by State law in one or more States,

(2) the term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(A)), but does not include any local government as defined in paragraph (1) of this section, and

(3) the term "State" has the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

SEC. 3. (a) No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

SEC. 4. (a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply with respect to cases commenced before the effective date of this Act.

SEC. 5. Section 510 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1985 (Public Law 98-411), is repealed.

SEC. 6. This Act shall take effect thirty days before the date of the enactment of this Act.

Approved October 24, 1984.

APPENDIX C

STATE STATUTES

The history and content of the multiple statutes and bills that produced the 1983, and later the 1985, Texas legislation are more fully set forth in the Whorton Appellants' Reply Brief and attached Statutory Appendix in the Fifth Circuit. Reprinted here are some of the parts most relevant to this petition for certiorari.

App. Page

I. 1983 Tex. Gen. Laws, ch. 626, 4015-4022, Obstruction to Air Navigation Control Act and Taxicab Licensing Act. 31a

II. 1983 Tex. Gen. Laws, ch. 978, 5322-5324, Municipal Airports—Joint Boards—Contracts, Leases, and Other Arrangements—Use of Property 32a

III. 1985 Tex. Gen. Laws, ch. 268, 2322-24, Taxicabs-Operation at Airports-Regulation. 34a

IV. Texas Municipal Airports Act, TEX. REV. CIV. STAT. ANN., art. 46d-4(a)(2), art. 46d-14(d)6, 7, and note (Vernon Supp. 1985). ... 37a

V. Texas Motor Bus Act, TEX. REV. CIV. STAT. ANN., art. 911a, §1(c) (Vernon Sup. 1985). 41a

APP. C-I.

1983 TEX. GEN. LAWS, CH. 626, 4015-4022, *OBSTRUCTION TO AIR NAVIGATION CONTROL ACT AND TAXICAB LICENSING*

CHAPTER 626

S. B. NO. 960

AN ACT

relating to the regulation of obstructions to air navigation of taxicabs serving certain airports; . . . adding Subdivisions (6) and (7) to Subsection (d), Section 14, Municipal Airports Act (Article 46d-14, Vernon's Texas Civil Statutes).

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

* * * *

SECTION 2. Subsection (d), Section 14, Municipal Airports Act (Article 46d-14, Vernon's Texas Civil Statutes), is amended by adding[11] Subdivisions (6) and (7) to read as follows:

"(6) Taxicab Licensing Notwithstanding any contrary provisions in H.B. 593, Acts of the 68th Legislature, Regular Session, 1983,[12] a joint airport board established pur-

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[11] Vernon's Ann. Civ. St. art. 46d-14, subsec. 12. Chapter 263. (d). subds. (6&7).

Additions in text indicated by underline; deletions by [brackets]

[12] Passed the Senate on April 14, 1983: Yeas 30, Nays 0; May 27, 1983, Senate refused to concur in House amendments and requested appointment of Conference Committee; May 27, 1983, House granted request of the Senate; May 28, 1983, Senate adopted Conference Committee Report by a viva-voce vote; passed the House, with amendments, on May 25, 1983, by a non-record vote, May 27, 1983, House granted request of the Senate for appointment of Conference Committee; May 30, 1983, House adopted Conference Committee Report by a non-record

suant to Chapter 114, Acts of the 50th Legtislature, Regular Session, 1947, as amended (Article 46d-14, Vernon's Texas Civil Statutes), shall have power to license taxicabs picking up passengers at or delivering passengers to the airport.

"(7) Regulations. Any resolutions, rules, regulations, or orders of the joint board dealing with subjects authorized by Subdivision (6) of this subsection become effective only upon approval of the governing bodies of the constituent public agencies. Upon the approval, the resolutions, rules, regulations, or orders of the joint board have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations, or orders of each public agency would have in its own territory or jurisdiction."

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vote.

Filed without signature June 19, 1983.

Effective Sept. 1, 1983.

APP. C-II

1983 TEX. GEN. LAWS, CH. 978, 5322-5324, MUNICIPAL AIRPORTS—JOINT BOARDS—CONTRACTS, LEASES, AND OTHER ARRANGEMENTS—USE OF PROPERTY

CHAPTER 978

H. B. No. 2009

AN ACT

relating to contracts, leases, and other arrangements for the use and occupancy of airport property entered into by joint boards under the Municipal Airports Act.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subsection (d), Section 14, Municipal Airports Act (Article 46d-14, Vernon's Texas Civil Statutes), is amended to read as follows:

(d) Limitations on Joint Board.

. . . .

(4) Disposal of Real Property. Use of Property by Others. The joint board shall not dispose of any airport, air navigation facility or real property under its jurisdiction except with the consent of the governing bodies of its constituent public agencies. [provided that] However, the joint board may, without such consent, enter into [the contract, lease or other arrangements contemplated by Section 4 of this Act] contracts, leases, or other arrangements for the use and occupancy by others of airport lands and personal property for the purposes specified in Section 4 of this Act upon such terms, for such rentals, revenues, and payments, and for such period or periods of years and with such options of renewal, as shall be approved by the joint board. It is provided, however, that if any such con-

tract, lease, or other arrangement shall be for a term, including any renewal or option terms, in excess of 40 years, the same shall be subject to the approval of each of the governing bodies of the constituent public agencies of the joint board unless the necessity for such approval is waived by resolution of each such governing body.

SECTION 2.[27] Any and all contracts, leases, or other arrangements for the use or occupancy of airport property executed by joint boards created under the Municipal Airports Act (Article 46d-1 et seq., Vernon's Texas Civil Statutes), and all provisions thereof, and executed prior to the effective date of this Act, are hereby validated and confirmed and the same are fully effective and represent the lawful agreements and undertakings of joint boards in accordance with the terms thereof.

SECTION 3. This Act takes effect September 1, 1983.

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[27] Vernon's Ann. Civ. St. art. 46d-14 note.

Passed by the House on April 21, 1983: Yeas 133, Nays 1, 1 present, not voting; passed by the Senate on May 19, 1983; Yeas 29, Nays 0.

Approved June 19, 1983.

Effective Sept. 1, 1983.

Additions in text indicated by underline; deletions by [brackets]

APP. C-III

Ch. 268, TEXAS 69th LEGISLATURE—REGULAR SESSION (1985)

TAXICABS—OPERATION AT AIRPORTS—REGULATION

CHAPTER 268

S. B. No. 748

AN ACT

relating to the regulation of taxicabs operating at certain airports; amending Subsection (c), Section 1, Chapter 270, Acts of the 40th Legislature, Regular Session, 1927, as amended, and Subdivision (6), Subsection (d), Section 14, Chapter 114, Acts of the 50th Legislature, Regular Session, 1947, as amended (Articles 911a and 46d-14, Vernon's Texas Civil Statutes).

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subsection (c), Section 1, Chapter 270, Acts of the 40th Legislature, Regular Session, 1927, as amended (Article 911a, Vernon's Texas Civil Statutes), is amended[78] to read as follows:

"(c) The term 'Motor Bus Company' when used in this Act means every corporation or persons as herein defined, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled passenger vehicle not usually operated on or over rails, and engaged in the business of transporting persons for compensation or hire over the public highways within the State of Texas, whether operating over fixed routes or fixed schedules, or otherwise.

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[78] Vernon's Ann.Civ.St. art. 911a, § 1, subsec. (c).

However, the term 'Motor Bus Company' as used in this Act shall not include:

"(1) corporations or persons, their lessees, trustees, or receivers, or trustees appointed by any court whatsoever, insofar as they own, control, operate, or manage motor propelled passenger vehicles operated wholly within the limits of any incorporated town or city, and the suburbs thereof, whether separately incorporated or otherwise;

. . .

"(3) corporations or persons, their lessees, trustees, or receivers, or trustees appointed by any court whatsoever, insofar as they own, control, operate, or manage motor propelled taxicabs designed for carrying no more then five passengers [(permits, licenses, or certificates issued prior to June 1, 1983, would not be affected by the provisions of this exclusion. Such taxicabs are motor buses only when they operate to or from an airport established pursuant to Section 14, Chapter 114, Acts of the 50th Legislature, 1947, as amended (Article 46d-14 Vernon's Texas Civil Statutes)]."

SECTION 2. Subdivision (6), Subsection (d), Section 14, Chapter 114, Acts of the 50th Legislature, Regular Session, 1947 (Article 46d-14, Vernon's Texas Civil Statutes), is amended[79] to read as follows:

"(6) Taxicab Licensing. A [Notwithstanding any contrary provisions in H.R. 593, Acts of the 68th Legislature, Regular Session 1983 a] joint airport board established pursuant to this Act [Chapter 114 Acts of the 50th Legislature Regular Session 1917 as amended (Article 46d-14 Vernon's Texas Civil Statutes)] shall have power to license taxicabs picking up passengers at or delivering passengers to the airport and to charge and collect fees with respect to the issuance of licenses under this subdivision."

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[79] Vernon's Ann.Civ.St. art. 46d-14, subsec. (d).

SECTION 3.[80] A permit for the operation of a taxicab that was issued by the Railroad Commission of Texas under Chapter 270, Acts of the 40th Legislature, Regular Session, 1927, as amended (Article 911a, Vernon's Texas Civil Statutes), before the effective date of this Act, is valid for the period for which the permit was issued.

* * * *

Passed the Senate on April 30, 1985; Yeas 22, Nays 0; passed the House on May 17, 1985; Yeas 117, Nays 0; three present not voting.

Approved June 5, 1985.

Effective June 5, 1985.

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[80] Vernon's Ann.Civ.St. art. 911a note.

(Editorial Note: [~~strike-outs~~] have been converted to [ ] for readibility so that legislative deletions are indicated by [ ].)

APP. C-IV

TEXAS MUNICIPAL AIRPORTS ACT
(As Amended, 1985)

Art. 46d—4. Operation and use privileges

(a) Under Municipal Operation. In operating an airport or air navigation facility owned, leased or controlled by a municipality, such municipality may, except as may be limited by the terms and conditions of any grant, loan, or agreement pursuant to Section 12 of this Act,[1] enter into contracts, leases and other arrangements for a term not exceeding forty (40) years with any persons:

(1) granting the privilege of using or improving such airport or air navigation facility or any portion or facility thereof, or space therein for commercial purposes;

(2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport or air navigation facility; or

(3) making available services to be furnished by the municipality or its agents at such airport or air navigation facility.

In each case the municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services, which shall be reasonable and uniform for the same class of privilege or service and shall be established with due regard to the property and improvements used and the expenses of operation to the municipality.

(b) Under Other Operation. Except as may be limited by the terms and conditions of any grant, loan, or agreement pursuant to Section 12 of this Act, a municipality may be contract, lease or other arrangement, upon a con-

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[1] Article 46d-12.

sideration fixed by it, grant to any qualified person for a term not to exceed forty (40) years the privilege of operating, as agent of the municipality or otherwise, any airport owned or controlled by the municipality; provided that no such person shall be granted any authority to operate the airport other than a public airport or to enter into any contracts, leases or other agreements in connection with the operation of the airport which the municipality might not have undertaken under Subsection (a) of this Section.

Acts 1947, 50th Leg., p. 185, ch. 114, § 4.

* * * *

(d) Limitations on Joint Board.

* * * *

(4) Disposal of Real Property. Use of Property by Others. The joint board shall not dispose of any airport, air navigation facility or real property under its jurisdiction except with the consent of the governing bodies of its constituent public agencies. However, the joint board may, without such consent, enter into contracts, leases, or other arrangements for the use and occupancy by others of airport lands and personal property for the purposes specified in Section 4 of this Act upon such terms, for such rentals, revenues, and payments, and for such period or periods of years and with such options of renewal, as shall be approved by the joint board. It is provided, however, that if any such contract, lease, or other arrangement shall be for a term, including any renewal or option terms, in excess of 40 year, the same shall be subject to the approval of each of the governing bodies of the constituent public agencies of the joint board unless the necessity for such approval is waived by resolution of each such governing body.

(5) Police Regulations. Any resolutions, rules, regulations, or orders of the joint board dealing with subjects authorized by Section 7 of this Act shall become effective only upon approval of the governing bodies of the constituent public agencies provided that upon such approval, the resolutions, rules, regulations or orders of the joint board shall have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations or orders of each public agency would have in its own territory or jurisdiction.

(6) Taxicab Licensing. A joint airport board established pursuant to this Act shall have power to license taxicabs picking up passengers at or delivering passengers to the airport and to charge and collect fees with respect to the issuance of licenses under this subdivision.

(7) Regulations. Any resolutions, rules, regulations, or orders of the joint board dealing with subjects authorized by Subdivision (6) of this subsection become effective only upon approval of the governing bodies of the constituent public agencies. Upon the approval, the resolutions, rules, regulations, or orders of the joint board have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations, or orders of each public agency would have in its own territory or jurisdiction.

* * * * * * * * * * *

Subsecs. (1) to (c) amended by Acts 1981, 67th Leg., p. 852, ch. 300, § 2, eff. Aug. 31, 1984;
Subsec. (d) amended by Acts 1983, 68th Leg., p. 5322, ch. 978, § 1, eff. Sept. 1, 1983;
Subsec. (d)(6), (7) added by Acts 1983, 68th Leg., p. 4022, ch. 626, § 2, eff. Sept. 1, 1983;
Subsec. (d)(6) amended by Acts 1985, 69th Leg., p. 2323, ch. 268, § 2, eff. June 5, 1985.

Section 2 of Acts 1983, 68th Leg., p. 5323, ch. 978, provided:

"Any and all contracts, leases, or other arrangements for the use or occupancy of airport property executed by joint boards created under the Municipal Airports Act (Article 46d-1 et seq., Vernon's Texas Civil Statutes), and all provisions thereof, and executed prior to the effective date of this Act, are hereby validated and confirmed and the same are fully effective and represent the lawful agreements and undertakings of joint boards in accordance with the terms thereof."

APP. C-V

THE MOTOR BUS ACT, ARTICLE 911a MOTOR BUS TRANSPORTATION AND REGULATION BY RAILROAD COMMISSION, AS AMENDED, JUNE 5, 1985

Art. 911a. Motor bus transportation and regulation by Railroad Commission Definitions

Sec. 1.

* * * * * * * * * * *

(c) The term "Motor Bus Company" when used in this Act means every corporation or persons as herein defined, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled passenger vehicle not usually operated on or over rails, and engaged in the business of transporting persons for compensation or hire over the public highways within the State of Texas, whether operating over fixed routes or fixed schedules, or otherwise. However, the term "Motor Bus Company" as used in this Act shall not include:

(4) corporations or persons, their lessees, trustees, or receivers, or trustees appointed by any court whatsoever, insofar as they own, control, operate, or manage motor propelled taxicabs designed for carrying no more than five passengers.

* * * * * * * * * * *

Sec. 1(c) amended by Acts 1981, 67th Leg., p. 294, ch. 118, § 1, eff. May 13, 1981: Acts 1983, 68th Leg., p. 1180, ch. 263, § 14, eff. Sept. 1, 1983; Acts 1983, 68th Leg., 1st C.S., p. 13, ch. 2, § 1, eff. Sept. 1, 1983; Acts 1985, 69th Leg., p. 186, ch. 54, § 1, eff. April 30, 1985; Acts 1985, 69th Leg., p. 2322, ch. 268, § 1, eff. June 5, 1985.

* * * * * * * * * * *

APPENDIX D

STATE LEGISLATIVE HISTORY EXCERPT.

OFFICE OF THE GOVERNOR
STATE CAPITOL
AUSTIN, TEXAS 78711
January 11, 1985

State of Texas
County of Travis

AFFIDAVIT

Before me the undersigned authority on this day personally appeared Glen David Mason who stated and deposed the following:

"I, Glen David Mason, assistant press secretary, Office of the Governor of the State of Texas, affirm and certify that the attached copy of a press release dated May 27, 1983, from the Office of Governor Mark White is a true and correct copy of said press release as made available to the press on or about May 27, 1983."

/s/ GLEN DAVID MASON
GLEN DAVID MASON

Subscribed and sworn this 11th day of January, 1985.

/s/ UNREADABLE
Notary Public in and for the State of Texas, my commission expires 08-03-85

Office of Governor Mark White

May 27, 1983

I am very pleased that the House and Senate today acted quickly to make changes to correct problems in the Railroad Commission bill. These revisions overcome the objections and concerns which I expressed in meetings yesterday and today with members of the Commission, Legislators and others.

Specifically, my concern that the original bill placed the State in the position of legislating a monopoly for a single taxi company, while preventing free market competition, has been sufficiently addressed. An additional problem, which would have enabled members of the Railroad Commission to own stock in railroad companies, creating the potential for a clear conflict of interest, has now been corrected.

Rumors that there would be a veto of this legislation should be put to rest.

I appreciate the cooperation of the Speaker and Lieutenant Governor and the members of the House and Senate to deal so expeditiously with this matter.

Supreme Court, U.S.
FILED
FEB 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1045

CARL WHORTON, KEN WHORTON, et al.,
Petitioners,

vs.

SURTRAN TAXICABS, INC., YELLOW CAB OF DALLAS, INC.,
FORT WORTH CAB & BAGGAGE CO., INC.,
CITY OF DALLAS, TEXAS, CITY OF FORT WORTH, TEXAS,
CITY OF IRVING, TEXAS, CITY OF GRAPEVINE, TEXAS,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit

JOINT BRIEF OF RESPONDENTS CITIES OF DALLAS AND FORT WORTH IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents.

**On Petition for a Writ of Certiorari to
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for The Fifth Circuit**

JOINT BRIEF OF RESPONDENTS CITIES OF DALLAS AND FORT WORTH IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, the Cities of Dallas and Fort Worth, Texas respectfully pray that the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the proceeding entitled, *Woolen, et al. v. Surtran Taxicabs, Inc., et al.* on September 26, 1986, be denied.

STATUTES INVOLVED

In addition to the state statutes cited by Petitioners, Respondents would add:

(1) Sections 20 and 21, Tex.Rev.Civ.Stat.Ann. art. 1175 (Vernon 1969), Texas Home-Rule Statute; and

(2) Tex.Rev.Civ.Stat.Ann. art. 46d-14 (Vernon 1969), Texas Municipal Airport Act (herein referred to as "Act" or "art. 46d-14").

Relevant portions appear in the Appendix.

STATEMENT OF THE CASE

Respondents are satisfied with Petitioners' statement of the case, with the following additions:

First, the Trial Court's opinion dismissing the municipal defendants was grounded upon art. 46d-14, as it existed in 1969, which authorized the municipal defendants to exercise their home-rule powers at a regional airport through a joint airport board. This Act sufficed as the requisite "clear articulation of a state policy to displace competition."

Second, the Trial Court's decision was not premised on a "retroactive validation" of Respondents' actions, as Petitioners claim.

Third, the Dallas-Fort Worth Regional Airport is not "located outside the city limits of both cities," as Petitioners claim. It is located in part within the city limits of Fort Worth, Texas.

SUMMARY OF ARGUMENTS

The issues raised by Petitioners have wholly failed to raise a question needing resolution by this Court.

First, Petitioners argue that "a clearly articulated and affirmatively expressed state policy" must be established by a pre-existing state statute. (Pet. 6-7). Art. 46d-14 satisfies this requirement. Therefore, Petitioners are merely requesting this Court to reconsider the same issue that it decided in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 85 L.Ed.2d 24, 105 S.Ct. 1713 (1985). The Fifth Circuit applied the *Town of Hallie* test of foreseeability to art. 46d-14 and held that the potentially anticompetitive state policy can reasonably be inferred from the state's broad grant of authority over airport management to municipalities. *Independent Taxicab Drivers Employees v. Greater Houston Transportation Company*, 760 F.2d 607, 610-611, *cert. den.*, 106 S.Ct. 231 (1985). In the present case, the District Court applied and followed *Independent Taxicab*. (615 F.Supp., at 346-47).

Petitioners next argue that the Local Government Antitrust Act ("LGAA") does not permit a federal court to consider alternative remedies against private defendants as grounds for retroactive application of the LGAA. (Pet. 15-16). This argument is not supported in law. The LGAA dictates that it be applied "in light of all the circumstances." 15 U.S.C. § 35(3)(b). Furthermore, Petitioners' argument was neither briefed nor argued before the Court of Appeals; therefore, it was not properly preserved for review by this Court.[1] Finally, the District Court's dismissal of the municipal defendants under the LGAA was decided on grounds independent of state-action immunity.

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[1]See e.g. *EEOC v. FLRA*, 476 U.S. ____, 90 L.Ed.2d 19, 24, 106 S.Ct. 1678 (1986); *Husty v. United States*, 282 U.S. 694, 701-702, 75 L.Ed 629, 633, 51 S.Ct. 240 (1931); *Duignan v. United States*, 274 U.S. 195, 200, 71 L.Ed. 996, 1000, 47 S.Ct. 566 (1927); *Kremp v. Dodds*, 775 F.2d 1319, 1321 n.2 (5th Cir. 1985); *Franceski v. Plaquemines Parish School Bd.*, 772 F.2d 197, 199 (5th Cir. 1985).

REASONS FOR DENYING THE PETITION

I. IN DETERMINING WHETHER STATE POLICY EXISTED TO AUTHORIZE THE MUNICIPAL DEFENDANTS TO GRANT A SINGLE TAXICAB FRANCHISE AT THE AIRPORT, THE DISTRICT COURT APPLIED THE PROSPECTIVE TEST URGED BY PETITIONERS.

A. State policy existed prior to the municipal defendants' activity. Tex.Rev.Civ.Stat.Ann. art. 46d-14 (Vernon 1969).

Petitioners first argue that a *post hoc* validating statute is insufficient to "clearly articulate and affirmatively express" a state policy in favor of municipal regulations as required by *Town of Hallie.* (Pet. 6-7). However, in *Independent Taxicab,* the Fifth Circuit did not rely on a *post hoc* validating statute but held that the 1947 provision of art. 46d-14 is

> "a strong indication of the states' desire to abdicate in favor of municipal prescience with regard to airport management. . . . [A] decision to confer the privilege of airport taxicab operation on a single company . . . is a logical and reasonable consequence of the state's broad allocation of authority,"

(615 F.Supp., at 347).

Petitioners seek to distinguish *Independent Taxicab* because Houston wholly owns and operates its airport, while in the instant case, the cities of Dallas and Fort Worth jointly own and operate their regional airport. Nonetheless, the District Court properly applied *Independent Taxicab* because art. 46d-14(b) authorized the cities to jointly acquire, own, and operate municipal airports. (615 F.Supp., at 347-48).

> "... [A]ny two or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint acquisition and operation of airports..."

Art. 46d-14(b).

The same statutory authority existed for both Houston and the cities of Dallas and Fort Worth. Therefore, Petitioners' argument must fail.

Consistent with the Fifth Circuit's *Independent Taxicab* decision, and similar decisions of the other circuits,[2] the District Court faithfully applied the *Town of Hallie* standard that Petitioners now urge. The relief requested has already been granted by both the District Court and the Court of Appeals.

Further review is unnecessary.

B. The Amendments to the Municipal Airports Act are irrelevant to the District Court's dismissal under the state-action immunity defense.

In a further attempt to distinguish *Independent Taxicab*, Petitioners argue that prior to 1983, no governmental entity had any power to regulate taxicab service at the Dallas-Fort Worth Regional Airport, because it was jointly owned. (615 F.Supp., at 348) In rejecting Petitioners' contentions, the District Court regarded the 1983 amendment to art. 46d-14 as an "adequate indication of the state's desire to allow

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[2]See e.g., *Cine 42nd Street Theatre Corp v. Nederlander Org.*, 790 F.2d 1032 (2nd Cir. 1986); *LaSalle Nat. Bank of Chicago v. County of DuPage*, 777 F.2d 377, 381 (7th Cir. 1985) *cert. den.*, 106 S.Ct. 2892 (1986); *Mercy-Peninsula Ambulance v. San Mateo County*, 791 F.2d 755, 757 (9th Cir. 1986); *Grason Elec. v. Sacramento Mun. Utility Dist.*, 770 F.2d 833, 836 (9th Cir. 1985), *cert. den.*, 106 S.Ct. 886 (1986); *Auton v. Dade City, Florida*, 783 F.2d 1009, 1011 (11th Cir. 1986); *L&H Sanitation v. Lake City Sanitation*, 769 F.2d 517, 520 (8th Cir. 1985); *Mass. Furniture & Piano Movers Ass'n v. F.T.C.*, 773 F.2d 391, 396 (1st Cir. 1985).

joint airports to displace competition." (615 F.Supp., at 349). Nowhere in the opinion does the Court indicate a reliance upon the Act for retroactive validation as Petitioners contend. Instead the District Court relied upon art. 46d-14, (Vernon 1969) as providing the necessary anticompetitive state policy. The Court did not adopt a "retrospective rule." (615 F.Supp., at 347-48). Therefore, review of this issue is unwarranted and unnecessary.

II. IN CONSIDERING RETROACTIVE IMMUNITY, THIS COURT NEED NOT DETERMINE WHETHER THE LOCAL GOVERNMENT ANTITRUST ACT PROHIBITS THE LOWER COURT FROM WEIGHING THE EXISTENCE OF ALTERNATIVE RELIEF AGAINST PRIVATE DEFENDANTS.

Petitioners, for the first time, argue that the Fifth Circuit erred when it dismissed the municipal defendants by weighing the alternative relief against private defendants. (Pet. 15-16). Petitioners now request that the Court fashion an appropriate equitable remedy against the municipal defendants as an equitable *condition* of the retroactive application of the LGAA. (Pet. 18, emphasis added). This Court should decline review for three reasons.

A. Petitioners failed to brief or argue this issue before the Court of Appeals.

It is elementary that a point of error is waived if not raised at either the District Court or Appellate Court. It cannot be raised for the first time on appeal to the United States Supreme Court.[3] The sole reference to Petitioners'

[3]Note 1, supra.

LGAA equity argument is on page 24 of Whorton's Reply Brief in the Fifth Circuit wherein he argues that:

> "3. A dismissal without remedy under the Local Government Antitrust Immunity Act of 1984 requires an equity trial of fact in order to apply equitable principles mandated by the Act. . . ."

This is the first and only reference made prior to the filing of the petition for writ of certiorari. Consequently, this point was not preserved for review.

B. The retroactive application of the LGAA immunity defense was expressly decided on additional independent grounds.

The District Court considered the impact of the LGAA (independent of the State-action immunity and *Noerr-Pennington* defenses) and stated in its opinion that:

> The second question before the Court is whether the plaintiff's claims for damages, interest on damages, costs and attorney's fees against the cities should, *in the alternative,* be dismissed under § 3 of the Local Government Antitrust Act of 1984.

(615 F.Supp., at 350, emphasis added).

C. The District Court properly dismissed the municipal defendants.

Even if review is deemed appropriate by this Court, the trial court's decision to dismiss was entirely correct.

The LGAA may be applied retroactively if,

> "the Defendant establishes and the Court determines, in light of all the circumstances, including the stage of the litigation and the availability of relief under the Clayton Act that it would be inequitable not to apply this subsection to a pending case, . . ."

15 U.S.C. § 35(3)(b).

Following the dictates of the LGAA, the District Court determined, in light of all the circumstances, that it would be inequitable not to apply § 3(a) of the LGAA in the instant case. (615 F.Supp., at 353). Despite the clear statutory language, Petitioners argue that the trial court could not consider alternative relief against private defendants. (Pet. 15-16).

The plain meaning of statutory language takes precedence in determining congressional intent. See e.g. *Rubin v. United States,* 449 U.S. 424, 430, 66 L.Ed.2d 633, 638, 101 S.Ct. 698 (1981) and the cases cited therein. Moreover, Petitioners' interpretation of the LGAA finds no support in the *Wetzel* case. (Pet. 18). *Wetzel* is a Title VII case concerned not with the LGAA, but with class action relief under Fed.R.Civ.P., Rules 23(b)(2) and 23(b)(3).

Petitioners' "alternative relief" argument is without merit.

CONCLUSION

The Petition for Certiorari raises no issue of significance to indicate that the lower court's decision to dismiss was improper. Dismissal of the municipal defendants was based upon both state-action immunity and the LGAA defenses. (615 F.Supp., at 349, 353). Even if one of Petitioners' points were meritorious, this Court must still uphold the trial court's ruling on the alternative grounds cited in the opinion.

For the reasons stated, Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 24th day of February, 1987, copies of this Joint Brief in Opposition were delivered to all Counsel of Record, in accordance with Sup. Ct. R. 28.3.

By: _____
DAVID J. LABREC

APPENDIX

Appendix

STATE STATUTES

Reprinted here are the pertinent sections of the relevant state statutes which were not included with the Petition for Writ of Certiorari.

1. Texas Home-Rule Statute,
TEX.REV.CIV.STAT.ANN.
art. 1175, §§ 20 and 21 (Vernon 1963) 2a

2. Texas Municipal Airports Act,
TEX.REV.CIV.STAT.ANN.
art. 46d-14 (Vernon 1969) 2a

3. Texas Municipal Airports Act,
TEX.REV.CIV.STAT.ANN.
art. 46d-14 (Vernon Supp. 1986) 6a

Texas Home Rule Statute

TEX.REV.CIV.STAT.ANN. art. 1175 §§ 20 and 21 (Vernon 1963)

> Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty:
>
> • • •

20. To license, operate and control the operation of all character of vehicles using the public streets, including motorcycles, automobiles, or like vehicles, and to prescribe the speed of the same, the qualification of the operator of the same, and the lighting of the same by night and to provide for giving bond or other security for the operation of the same.

21. To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire or the transportation of freight for hire on the public streets and alleys of the city.

Texas Municipal Airports Act (In Effect During The Period 1974-1981)

Art. 46d—14. Joint Operations

(a) Authorization. For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality, as defined in the Act[1], any agency of the State government and of the United States, and any municipality, political subdivision and agency of another State; and the term "governing body" means the governing body of a county or municipality, and the head of the agency if the public agency is other than a county or municipality. All powers, privileges and authority granted to any municipality by this Act may be exercised and enjoyed jointly with

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[1]Articles 46d-1 to 46d-22

any public agency of any other State or of the United States to the extent that the laws of such other State or of the government, when acting jointly with any municipality, may exercise and enjoy all of the powers, privileges and authority conferred by this Act upon a municipality.

(b) Agreement. Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two (2) or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint acquisition and operation of airports and air navigation facilities. Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. Each such agreement shall specify its duration, the proportionate interest which each public agency shall have in the property, facilities and privileges involved, the proportion to be borne by each public agency of preliminary costs and costs of acquisition, establishment, construction, enlargement, improvement, and equipment of the airport or air navigation facility, the proportion of the expenses of maintenance, operation, regulation and protection thereof to be borne by each and such other terms as are required by the provisions of this Section. The agreement may also provide for: amendments thereof, and conditions and methods of termination of the agreement; the disposal of all or any of the property, facilities and privileges jointly owned, prior to or upon said property, facilities and privileges, or any part thereof, ceasing to be used for the purposes provided in this Act, or upon termination of the agreement; the distribution of the proceeds received upon any such disposal, and of any funds or other property jointly owned and undisposed of; the assumption or payment of any indebtedness arising from the joint venture which remains unpaid upon the disposal of all assets or upon a termination of the agreement; and such other provisions as may be necessary or convenient.

(c) Joint Board. Public agencies acting jointly pursuant to this Section shall create a joint board which shall consist of members appointed by the governing body of each partici-

pating public agency. The number to be appointed, their term and compensation, if any, shall be provided for in the joint agreement. Each such joint board shall organize, select officers for terms to be fixed by the agreement, and adopt and amend from time to time rules for its own procedure. The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport or air navigation facility or airport hazard to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport, air navigation facility or airport hazard, subject to the limitations of Subsection (d) of this Section.

(d) Limitations on Joint Board

(1) Expenditures. The total expenditures to be made by the joint board for any purpose in any calendar year shall be determined by a budget approved by the governing bodies of its constituent public agencies on or before the preceding December 1st.

(2) Acquisitions Beyond Sums Allotted. No airport, air navigation facility, airport hazard, or real or personal property, the cost of which is in excess of sums therefor fixed by the joint agreement or allotted in the annual budget, may be acquired by the joint board without the approval of the governing bodies of its constituent public agencies.

(3) Eminent Domain. Eminent domain proceedings under this Section may be instituted only by authority of the governing bodies of the constituent public agencies of the joint board. If so authorized, such proceedings shall be instituted in the names of the constituent public agencies jointly, and the property so acquired shall be held by said public agencies as tenants in common until conveyed by them to the joint board.

(4) Disposal of Real Property. The joint board shall not dispose of any airport, air navigation facility or real property under its jurisdiction except with the consent of the

governing bodies of its constituent public agencies, provided that the joint board may, without such consent, enter into the contract, lease or other arrangements contemplated by Section 4 of this Act.[2]

(5) Police Regulations. Any resolution, rules, regulations, or orders of the joint board dealing with subjects authorized by Section 7 of this Act[3] shall become effective only upon approval of the governing bodies of the constituent public agencies provided that upon such approval, the resolutions, rules, regulations or order of the joint board shall have the same force and effect in the territories or jurisdictions involved as the ordinance, resolutions, rules, regulations or order of each public agency would have in its own territory or jurisdiction.

(e) Joint Fund. For the purpose of providing a joint board with moneys for the necessary expenditures in carrying out the provisions of this Section, a joint fund shall be created and maintained, into which shall be deposited the share of each of the constituent public agencies as provided by the joint agreement. Each of the constituent public agencies shall provide its share of the fund from sources available to each. Any Federal, State or other contributions or loans, and the revenues obtained from the joint ownership, control and operation of any airport or air navigation facility under the jurisdiction of the joint board shall be paid into the joint fund. Disbursements from such fund shall be made by order of the board, subject to the limitations prescribed in Subsection (d) of this Section.

Acts 1947, 50th Leg., p. 188, ch. 114, § 14.

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[2]Article 46d-4
[3]Article 46d-7

Texas Municipal Airports Act
(As Amended, 1985)

Art. 46d—14. Joint Operations

(a) Authorization. For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality, as defined in this Act, any agency of the State government and of the United States, and any municipality, political subdivision and agency of another State; and the term "governing body" means the governing body of a county or municipality, and the term "airport hazard area" means any area of land or water upon which an airport hazard might be established if not prevented as provided in this Act. All powers, privileges and authority granted to any municipality by this Act may be exercised and enjoyed jointly with any public agency of any other State of the United States to the extent that the laws of such other State of the United States permit such joint exercise or enjoyment. If not otherwise authorized by law, any agency of the State government when acting jointly with any municipality, may exercise and enjoy all of the powers, privileges and authority conferred by this Act upon a municipality.

(b) Agreement. Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two (2) or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint acquisition and operation of airports, air navigation facilities, or airport hazard areas. Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. Each such agreement shall specify its duration, the proportionate interest which each public agency shall have in the property, facilities and privileges involved, the proportion to be borne by each public agency of preliminary costs and costs of acquisition, establishment, construction, enlargement, improvement, and equipment of the airport, air navigation facility, or airport hazard area, the proportion of the

expenses of maintenance, operation, regulation and protection thereof to be borne by each and such other terms as are required by the provisions of this Section. The agreement may also provide for: amendments thereof, and conditions and methods of termination of this agreement; the disposal of all or any of the property, facilities and privileges jointly owned, prior to or upon said property, facilities and privileges, or any part thereof, ceasing to be used for the purposes provided in this Act, or upon termination of the agreement; the distribution of the proceeds received upon any such disposal, and of any funds or other property jointly owned and undisposed of; the assumption or payment of any indebtedness arising from the joint venture which remains unpaid upon the disposal of all assets or upon a termination of the agreement; and such other provisions as may be necessary or convenient.

(c) Joint Board. Public agencies acting jointly pursuant to this Section shall create a joint board which shall consist of members appointed by the governing body of each participating agency. The number to be appointed, their term and compensation, if any, shall be provided for in the joint agreement. Each such joint board shall organize, select officers for terms to be fixed by the agreement, and adopt and amend from time to time rules for its own procedure. The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport, air navigation facility, or airport hazard area to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport, air navigation facility or airport hazard area, subject to the limitation of Subsection (d) of this Section.

(d) Limitation on Joint Board.

(1) Expenditures. The total expenditures to be made by the joint board for any purpose in any calendar year shall be determined by a budget approved by the governing bodies of its constituent public agencies on or before the preceding December 1st.

(2) Acquisitions Beyond Sums Allotted. No airport, air navigation facility, airport hazard, or real or personal property, the cost of which is in excess of sums therefor fixed by the joint agreement or allotted in the annual budget, may be acquired by the joint board without the approval of the governing bodies of its constituent public agencies.

(3) Eminent Domain. Eminent domain proceedings under this Section may be instituted only by authority of the governing bodies of the constituent public agencies of the joint board. If so authorized, such proceedings shall be instituted in the names of the constituent public agencies jointly, and the property so acquired shall be held by said public agencies as tenants in common until conveyed by them to the joint board.

(4) Disposal of Real Property, Use of Property by Others. The joint board shall not dispose of any airport, air navigation facility or real property under its jurisdiction except with the consent of the governing bodies of its constituent public agencies. However, the joint board may, without such consent, enter into contracts, leases, or other arrangements for the use and occupancy by others of airport lands and personal property for the purposes specified in Section 4 of this Act upon such terms, for such rentals, revenues, and payments, and for such period or periods of years and with such options or renewal, as shall be approved by the joint board. It is provided, however, that if any such contract, lease, or other arrangement shall be for a term, including any renewal or option terms, in excess of 40 years, the same shall be subject to the approval of each of the governing bodies of the constituent public agencies of the joint board unless the necessity for such approval is waived by resolution of each such governing body.

(5) Police Regulations. Any resolutions, rules, regulations, or orders of the joint board dealing with subjects authorized by Section 7 of this Act shall become effective only upon approval of the governing bodies of the constituent public agencies provided that upon such approval, the resolutions, rules, regulations, or orders of the joint

board shall have the same force and effect in the territories or jurisdictions involved as the ordinances, resolution, rules, regulations or orders of each public agency would have in its own territory or jurisdiction.

(6) Taxicab Licensing. A joint airport board established pursuant to this Act shall have power to license taxicabs picking up passengers at or delivering passengers to the airport and to charge and collect fees with respect to the issuance of licenses under this subdivision.

(7) Regulations. Any resolutions, rules, regulations, or orders of the joint board dealing with subjects authorized by Subdivision (6) of this subsection become effective only upon approval of the governing bodies of the constituent public agencies. Upon the approval, the resolutions, rules, regulations, or orders of the joint board have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations, or orders of each public agency would have in its own territory or jurisdiction.

* * *

Subsecs. (a) to (c) amended by Acts 1981, 67th Leg., p.852, ch. 300 §2, eff. Aug. 31, 1981;

Subsec. (d) amended by Acts 1983, 68th Leg., p.5322, ch. 978, §1, eff. Sept. 1, 1983;

Subsec. (d)(6),(7) added by Acts 1983, 68th Leg., p.4022, ch. 626 §2, eff. Sept. 1, 1983;

Subsec. (d)(6) amended by Acts 1985, 69th Leg., p.2323, ch. 268, §2, eff. June 5, 1985.

Supreme Court, U.S.
FILED
FEB 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CARL WHORTON, KEN WHORTON, *et al.*,
Petitioners,

v.

SURTRAN TAXICABS, INC., YELLOW CAB OF DALLAS, INC., FORT WORTH CAB & BAGGAGE CO., INC., CITY OF DALLAS, TEXAS, CITY OF FORT WORTH, TEXAS, CITY OF IRVING, TEXAS, CITY OF GRAPEVINE, TEXAS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED BY PETITIONER

I. Whether a federal court is precluded from using a retroactive state statute validating a local government's prior monopoly contract to establish "a clearly articulated and affirmatively expressed state policy" showing "the legislature contemplated the acts complained of."

II. Whether the Local Government Antitrust Act of 1984 does not permit a federal court to weigh alternative, non-existent remedies against private defendants as a ground for granting a local government defendant retrospective immunity from all remedies, legal and equitable.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1045

CARL WHORTON, KEN WHORTON, *et al.*,
Petitioners,

v.

SURTRAN TAXICABS, INC., YELLOW CAB OF DALLAS, INC., FORT WORTH CAB & BAGGAGE COMPANY, INC., CITY OF DALLAS, TEXAS, CITY OF FORT WORTH, TEXAS, CITY OF IRVING, TEXAS, AND CITY OF GRAPEVINE, TEXAS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATUTES INVOLVED

The federal statutes involved are the Sherman Act and Clayton Act, 15 U.S.C. §1 et seq., and the Local Government Antitrust Act of 1984, 15 U.S.C. §35 (Supp. III, 1985). The latter is reprinted in Appendix B.

The state statutes involved are the Home Rule Municipal Powers Act and Texas Municipal Airports Act reprinted in Appendix C.

STATEMENT OF THE CASE

This is an antitrust case brought by taxicab drivers and owners against the Cities of Dallas and Fort Worth, joint owners of the Dallas/Fort Worth Airport and several cities within whose territorial limits some part of the airport lies. The suit alleges the contracts between the two owner cities and the provider of a single-operator ground transportation service at the airport resulted in antitrust violations as the contract prohibited Petitioner from picking up passengers at the passenger terminals.

Respondent wishes to except to Petitioner's statement (page 2, Petition) which indicates the ordinances of Respondent City of Irving, Texas, compelled taxicab owners to "deadhead, that is, to carry passengers to the airport, approximately twenty miles, and to return empty, without passengers". Respondent's disagreement with this statement is the passenger terminals which Petitioner sought to serve were not located within the territorial limits nor subject to regulatory control of this Respondent. This moots Petitioner's complaint against Respondent because this Respondent did not and could not regulate taxicab activity outside its territorial limits; therefore, Respondent could not have harmed Petitioner. However, if the terminals were located within Respondent's territorial limits and had Respondent regulated service at that terminal, Respondent's regulatory acts would have been immunized under the state action test.

Respondent further excepts to Petitioner's statement (page 4, Petition) which indicates this

Respondent was party to the contract between Dallas-Fort Worth Joint Airport Board and the cities which "modified the exclusive monopoly contract and compulsory deadheading". Respondent was not a party to said contract with the Cities of Dallas and Fort Worth relative to taxicab service provided at their airport.

Contrary to Petitioner's statement (pages 4 and 5, Petition), the trial court and Fifth Circuit Court of Appeals clearly indicated their *Town of Hallie* determination of antitrust immunity rested not upon a validating act but upon thirty (30) year old legislation, i.e., Texas Municipal Airports Act, Article 46d-4 and Article 46d-14, TEX. REV. CIV. STAT. ANN. Both Courts ruled the validating act cited by Petitioner only confirmed the state's policy of displacing competition with regulation:

> This clarifying legislation does not suggest that no power to regulate existed before its enactment. The validating statute suggests just the opposite. *Woolen v. City of Dallas, Texas, et al,* 801 F.2d 159 at 163 (5th Cir. 1986).

The Courts below dismissed Petitioner's antitrust actions on state action grounds, and, in the alternative held the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. (Oct. 24, 1984) was applicable to dismiss Petitioner's cause for damages, interest on damages, costs and attorney's fees against Respondents.

ARGUMENT

REASONS FOR DENYING THE PETITION

I. CONTRARY TO PETITIONER'S CONTENTION, THE COURTS BELOW DID RELY UPON STATUTES PRE-EXISTING THE INCEPTION OF THE COMPLAINED ACTION IN REACHING THEIR DECISION THAT RESPONDENTS WERE ACTING PURSUANT TO A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY SHOWING THE TEXAS LEGISLATURE CONTEMPLATED THE KIND OF ACTION OF WHICH PETITIONER COMPLAINED.

The *Town of Hallie v. City of Eau Claire,* 471 U.S. 34 (1985) municipal antitrust analysis performed by the Courts below resulted in the actions of all Respondents being immunized from antitrust scrutiny. Petitioner has only one complaint relative to that analysis. Petitioner contends the Courts based their decision upon legislation enacted subsequent to the time Respondents initiated the complained action. It is understandable Petitioner attempts to distinguish his case from all other similar antitrust cases because he must do so in order to be afforded any opportunity of achieving success. Petitioner emphasizes that since the publication of *Town of Hallie v. City of Eau Claire,* 471 U.S. 34 (1985), all Federal circuit court decisions applying the *Town of Hallie* test have found municipalities immune from antitrust scrutiny on summary motions. Petitioner has chosen to distinguish its case by characterizing it as one of "retroactive state policy." However, merely claiming the Courts below based their decision upon retroactive legislation does not make it so. Should retroactivity be a bar to the state action immunity doctrine, it does not provide

Petitioner comfort for one controlling reason. The Courts below did not rely upon retroactive legislation to conclude Respondent's activities were undertaken pursuant to a clearly articulated and affirmatively expressed state policy.

The Fifth Circuit in *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Company* 760 F.2d 607, 611 (1985) cert. denied, 106 U.S. 231, based its decision on the Municipal Airports Act, Article 46d-4, TEX. REV. CIV. STAT. ANN., a 1947 vintage statute, in concluding the single operator concept was not subject to antitrust scrutiny. Through this Act, the Texas Legislature had delegated to the cities the State's regulatory authority over municipally owned airports. Later, when *Wooien v. City of Dallas, Texas, et al,* 801 F.2d 159 (5th Cir. 1986), came before it, the same Court held *Greater Houston* was "virtually indistinguishable from the case at bar." *Woolen, supra,* 801 F.2d 159. The Court cited that part of Municipal Airports Act, Article 46d-4, TEX. REV. CIV. STAT. ANN., which conferred the same authority on single city ownership that Municipal Airports Act, Article 46d-14, TEX. REV. CIV. STAT. ANN., conferred upon jointly owned airports.

The pertinent portions of Municipal Airports Act, Article 46d-4, TEX. REV. CIV. STAT. ANN., read as follows:

> (a) . . . In operating an airport . . . such municipality may . . . enter into contracts, leases and other arrangements for a term not exceeding forty (40) years with any persons:
>
> . . . .

> (2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport. . . .
>
> . . . .
>
> In each case the municipality may establish the terms and conditions and fix the charges, rentals, or fees for the privileges or services. . . . *Woolen, supra,* 801 F.2d at 161 (citation omitted).

The Fifth Circuit concluded this authority was sufficient to meet the requirements of the *Town of Hallie* test and the City of Houston's actions were immune from antitrust scrutiny.

In response to Petitioner's claim no legislative authority existed at the inception of the single-operator concept of ground transportation at Dallas/Fort Worth Airport, the Courts below compared Municipal Airports Act, Article 46d-4 and Article 46d-14, TEX. REV. CIV. STAT. ANN. The Act is 1947 vintage legislation. They concluded the only difference between *Greater Houston* and the case at bar was the Houston airport was solely owned while Dallas/Fort Worth Airport was jointly owned. The Courts noted Municipal Airports Act, Article 46d-14 TEX. REV. CIV. STAT. ANN. amply delegated the State's regulatory authority to the joint-ownership municipalities and cited the statute:

> That section provides, in relevant part:
>
> (a) For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality . . . .

> (b) Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint . . . operation of airports. . . . Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. . . .
>
> (c) . . . The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport . . . to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport. . . . *Woolen, supra,* 801 F.2d at 162 (citation omitted).

After comparing the two Articles of the Municipal Airports Act, the Courts concluded the Act indicated the Legislature did not intend to distinguish between joint ownership and sole ownership airport operation and there was sufficient authority to immunize the Dallas/Fort Worth Airport operation from antitrust scrutiny stating:

> The Regional Airport Board is designed as a mechanism for joint action. That the defendant cities in these actions operated through the Regional Airport Board on a jointly owned airport, instead of on their own

> on individually owned airports, does not affect their state action exemption. '[T]he state's desire to abdicate in favor of municipal prescience with regard to airport management' is equally clear in both instances. The decision to grant an exclusive airport taxicab franchise—to utilize the 'single-operator concept,' in the parlance of these actions—is a logical and reasonable consequence of the State's broad allocation of authority to cities to jointly acquire, own and operate municipal airports. *Woolen, supra,* 801 F.2d at 162 (citation omitted).

This answered the adequacy of legislation question in favor of the municipalities. The same legislation clearly answered Petitioner's main contention, i.e., retroactivity. Although Petitioner claims the amendment to Municipal Airports Act, Article 46d-14 TEX. REV. CIV. STAT. ANN. and the validating act proved there was no prior immunizing authority, the Courts were of a different opinion and responded that Petitioner was in error writing:

> From these enactments, Plaintiffs draw the conclusion that no governmental entity had any power to regulate taxicab service at the airport until September of 1983. The opposite is true.
>
> The amendment to § 14 of the Municipal Airport Act was designed to clarify the role of joint airport boards in regulating taxicab service at joint airports because of uncertainties that might have arisen from concurrent legislation which clarified the role of the

> Railroad Commission in establishing licensing requirements under the Motor Bus Act, Article 911a. See 1983 Tex. Gen. Laws, ch. 263, at 1161. This clarifying legislation does not suggest that no power to regulate existed before its enactment. The validating statute suggests just the opposite. *Woolen, supra,* 801 F.2d at 163 (citation omitted).

Finally the Courts held:

> . . . the challenged conduct is immune from scrutiny under the antitrust laws by virtue of the state action exemption. *Woolen, supra,* 801 F.2d at 163 (citation omitted).

Contrary to Petitioner's contention, the Courts based their decisions upon statutory authority pre-existing the inception in 1974 of the single-operator concept for ground transportation at the Dallas/Fort Worth Airport.

The pre-existing statute provided ample, clearly articulated and affirmatively expressed state policy to displace competition in the taxicab business at the Dallas/Fort Worth Airport. This is all *Town of Hallie* requires. The Courts further answered Petitioner's contention when they forcefully noted the amendments and validating act confirmed the intent of the legislative policy originally expressed at the time the Legislature enacted Municipal Airports Act, Article 46d-14, TEX. REV. CIV. STAT. ANN., in 1947, remains unchanged.

Respondent submits Petitioner's case is on all fours with *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.,* 760 F.2d 607

(5th Cir. 1985), cert. den., 106 U.S. 231, and the Petition should be denied.

II. THE TEXAS LEGISLATURE HAS HISTORICALLY AUTHORIZED MUNICIPALITIES TO DISPLACE COMPETITION IN THE TAXICAB BUSINESS—AUTHORITY OF RESPONDENT CITY OF IRVING TO REGULATE THE TAXICAB BUSINESS WITHIN ITS TERRITORIAL LIMITS.

If the Municipal Airports Act was not sufficient to immunize Respondents from antitrust scrutiny, the Respondent City of Irving wishes to note there are additional applicable statutes which immunize it from antitrust scrutiny. The Dallas/Fort Worth Airport passenger terminals have never been located within the territorial limits of Respondent City of Irving and Respondent has never had an ownership interest in said airport. This lack of jurisdiction prevents Respondent from exercising regulatory control over the taxicab service at those terminals and Respondent has not attempted to exercise such regulatory control. However, if the terminals were located within the Respondent's territorial limits, Respondent's regulatory control over taxicab service at those terminals would be exempted from antitrust scrutiny by virtue of statutory authorization.

The Texas Legislature has traditionally authorized municipalities to comprehensively regulate the taxicab business since the turn of this century thereby displacing competition in that field with regulation. The regulation of taxicab service by Texas municipalities is immunized from antitrust scrutiny if the action of the legislature clearly articulates and affirmatively expresses a state policy to displace competition in the

regulated area. *Town of Hallie v. City of Eau Claire,* 471 U.S. 34 (1985) and *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Company,* 760 F.2d 607 (5th Cir.) cert. denied, 106 U.S. 231 (1985).

For the past seventy (70) years, Texas Courts have uniformly held the Texas Legislature delegated its power to municipalities to control streets and regulate those doing business thereon. The Texas Civil Court of Appeals in *Craddock v. City of San Antonio,* 198 S.W. 634 (Tex. Civ. App. 1917, Refused) noted the Texas Legislature specifically vested power in municipalities to license and regulate the operation of vehicles offered to the public for hire. In *City of Dallas v. Gill,* 199 S.W. 1144, 1146, (Tex. Civ. App. 1917, Refused) the appellate court wrote:

> The Legislature having given the city of Dallas power to control its streets and to license persons doing business thereon for profit, it, in effect, repealed the common law as such action is inconsistent with the common law.

This delegation of regulatory authority was again restated in 1938 by the Texas Civil Court of Appeals in *Yellow Cab Transit Co., Inc. v. Tuck,* 115 S.W.2d 455, (Refused) when Yellow Cab sought to invalidate a City of Sherman ordinance regulating the use of its streets by vehicles for hire. The Court held the Texas Legislature through §20 of Article 1175 authorized municipalities to regulate vehicles using the public streets. It went on to emphasize this grant of authority writing:

> The Legislature has uniformly recognized, guarded, and preserved the plenary powers of municipal corporations operating under the Home Rule Amendment and the Enabling Act of the Legislature, over the streets, alleys, and public places located within the corporate limits.

Later in its opinion, the Court again noted the Legislature's deliberate effort to insure municipalities' authority to regulate for-hire vehicles was not inadvertently diminished by the passage of conflicting statutes:

> To the same extent were the rights of such corporations guarded in the enactment of chapter 277 of the Regular Session of the 42d Legislature, amending c. 314, 41st Leg., § 2, providing for the further regulation of and the issuance of permits and certificates to motor carriers for hire over the highways of this state, in providing that 'nothing in this Act or any provision thereof shall be construed or held to in any manner affect, limit or deprive cities and towns from exercising any of the powers granted them by chapter 147, Pages 307 to 318, inclusive [now article 1165 et seq., R.S.] of the General Laws of the State of Texas passed by the 33rd Legislature, or any amendments thereto.'

These cases serve to illustrate the great deference the Texas Legislature has historically paid municipalities relative to their authority to regulate vehicles for hire. This deference has not been diminished by

passage of time as reflected by the recent opinion of the Fifth Circuit Court of Appeals in *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607, cert. denied, 106 U.S. 231 (1985). The Fifth Circuit cited §20 and §21 of Article 1175, TEX. REV. CIV. STAT. ANN. as the Legislature's clear articulation and affirmative expression of state policy designed to displace competition by substituting municipal regulation. The Court wrote:

> Thus, in at least a general sense, the state legislature has vested extensive regulatory discretion in its cities over the taxicab industry. *Woolen, supra*, 760 F.2d at 610 (citation omitted).

The two sections referenced by the Courts read as follows:

> 20. To license, operate and control the operation of all character of vehicles using the public streets, including motorcycles, automobiles or like vehicles, and to prescribe the speed of the same, the qualification of the operator of the same, and the lighting of the same by night and to provide for the giving bond or other security for the operation of the same.
>
> 21. To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire or the transportation of freight for hire on the public streets and alleys of the city.

This statute has long expressed state policy, as acknowledged by the Courts, that each home rule municipality is to regulate for-hire vehicles plying the streets within its territorial limits. This legislation is a clear articulation and affirmative expression of state policy to displace competition with regulation in the taxicab business. For this reason, the Respondent City of Irving would be immune from antitrust scrutiny if the terminals had been located within Respondent's territorial limits. The Petition should be denied.

III. CONGRESS DID NOT INTEND THAT THE GRANT OF RETROACTIVE IMMUNITY TO LOCAL GOVERNMENTS FROM THE DAMAGES REMEDY BE CONDITIONED SOLELY UPON THE EXISTENCE OF ALTERNATIVE EQUITABLE RELIEF AGAINST THE PRIVATE DEFENDANTS.

Petitioner contends that if some alternative remedy is not available to Petitioner, Section 3(b) of the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (Oct. 24, 1984), enjoins the Courts from applying Section 3(a) of the Act to dismiss the defendant municipalities. Certainly that which Petitioner suggests is not supported by the very language of Section 3(b). That Section provides:

> (b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of

> a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

15 U.S.C. §35 (Supp. III, 1985).

The application of Section 3(a) to prevent recovery of damages, costs or attorney's fees from municipalities is not solely hinged upon a finding that alternative relief is or is not available. Section 3(b) specifically requires Courts to weigh all aspects of the case rather than one. The Legislative mandate to the Courts is to evaluate "all the circumstances, including the stage of litigation." The trial court and the Fifth Circuit explicitly followed the mandate of Section 3(b) in determining whether Section 3(a) should be applied to the municipal defendants. The factors which both Courts analyzed are set forth as follows:

1. Stage of litigation;
2. Availability of alternative relief under the Clayton Act;
3. Whether the local government was acting within its normal legislative, regulatory, executive, administrative, or judicial authority;
4. The financial harm which a treble damage award could inflict upon the municipality and its taxpayers; and
5. Whether the municipal action was predicated on or in furtherance of Federal or State laws, policies or regulations.

The Courts carefully examined all of these factors and determined it would be inequitable not to apply Section 3(a) to the Defendants stating:

> The Court determines, in light of all the circumstances, that it would be inequitable not to apply § 3(a) of the Local Government Antitrust Act of 1984, 15 U.S.C. §35(a), to this case. *Woolen, supra,* 801 F.2d at 167 (citation omitted).

It is submitted the Act does not require every one of the many factors under consideration to be in favor of the municipality as a condition to dismissing the antitrust action.

There is nothing in the opinion to suggest the Courts improperly applied Section 3(b) in dismissing the municipal defendants.

One additional reason why it would be inequitable not to dismiss the Petition is that this Court has previously denied certiorari in *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.,* 760 F.2d 607 cert. denied, 106 U.S. 231, (1985) which the Fifth Circuit Court of Appeals characterized as being "virtually indistinguishable from the instant actions." *Woolen, supra,* 801 F.2d 159 at 161.

It would be proper to deny the Petition for the reason the Fifth Circuit properly analyzed the case pursuant to the requirements of the Local Government Antitrust Act of 1984.

CONCLUSION

The Fifth Circuit Court of Appeals properly considered and applied the *Town of Hallie* test to the facts in the case at bar as it did in *Independent Taxicab Drivers' Employees v. Greater Houston Trans-*

portation Company, and Petition should be denied for the reason the actions of Respondent are immune from antitrust scrutiny.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1564

JOHN WOOLEN, *et al.*,
Plaintiffs,
JOHN D. CAMPISI, Individually and as Class Action Plaintiffs, *et al.*,
Plaintiffs-Appellants,
and
CARL WHORTON, *et al.*,
Intervenors-Appellants,
v.

SURTRAN TAXICABS, INC., *et al.*,
Defendants-Appellees.

KEN WHORTON, *et al.*,
Plaintiffs-Appellants,
v.

CITY OF DALLAS, TEXAS, *et al.*,
Defendants-Appellees.

OPINION

Filed September 26, 1986

Before: Thomas Gibbs Gee, Carolyn Dineen Randall and W. Eugene Davis, Circuit Judges.

Per Curiam

Appeals from the United States District Court
for the Northern District of Texas
Mary Lou Robinson, District Judge, Presiding

OPINION

PER CURIAM:

We affirm the judgment of the district court on the basis of its careful opinion which is attached as Appendix A.

AFFIRMED.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CIVIL ACTION NO. 3-78-609
CONSOLIDATED WITH:
CIVIL ACTION NO. 3-78-745

JOHN WOOLEN, *et al.*,

Plaintiffs,

VS.

SURTRAN TAXICABS, INC., *et al.*,

Defendants.

ORDER

The factual allegations in these antitrust actions have already been reported twice and need not be repeated at length here. See *Woolen v. Surtran Taxicabs*, 461 F.Supp. 1025 (N.D. Tex. 1978) (denying motions to dismiss); *Woolen v. Surtran Taxicabs*, 684 F.2d 324 (5th Cir. 1982) (vacating order denying intervention). In a nutshell, the plaintiff taxicab drivers claim that the defendants have excluded them from the outbound taxicab market at the Dallas/Fort Worth Regional Airport since the airport's opening in 1974, in violation of the Sherman Act.

Recent antitrust law developments, most notably passage of the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (Oct. 24, 1984) (to be codified in 15 U.S.C. § 35), and the recent decisions in *Town of*

Hallie v. City of Eau Claire, 105 S. Ct. 1713 (1985); *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721 (1985); and *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir. 1985), now require that three issues be addressed, including one previously decided in the original district court opinion in this case:[1]

I. Should these consolidated actions be dismissed because the Defendants' challenged activities are immune from scrutiny under the antitrust laws by virtue of the state action exemption?

II. Should the Plaintiffs' claims under § 4 of the Clayton Act for damages, interest on damages, costs and attorney's fees against the defendant cities be dismissed under § 3 of the Local Government Antitrust Act of 1984?

III. Should the Plaintiffs' claims against the private taxi company defendants be dismissed as barred under the *Noerr-Pennington* doctrine?

For the reasons set forth below, the Court answers each question in the affirmative.

---

[1] After these actions were filed in 1978, all defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, each asserting the state action exemption. These motions to dismiss were denied in the original district court opinion, 461 F.Supp. at 1031-33. On May 24, 1985, the Court issued an Order stating that it would reconsider these motions in light of subsequent authority. All parties submitted new briefs. On June 28, 1985, the private defendants—Surtran Taxicabs, Inc., Yellow Cab of Dallas, Inc., and Fort Worth Cab & Baggage Company, Inc.—moved for summary judgment under Rule 56, asserting the state action exemption and *Noerr-Pennington* immunity.

The issues concerning the Local Government Antitrust Act of 1984 were raised by the Court in an Order issued December 6, 1984. In response to that Order, each party filed papers addressing the applicability of the Act's provisions.

I. The State Action Exemption

A. The Municipal Defendants

In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court, relying on principles of federalism and state sovereignty, determined that the Sherman Act does not apply to the anticompetitive conduct of a state acting through its legislature. *Id.* at 350-51. Thirty-five years later, the Court also held that municipalities are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978). These actions were filed shortly after *City of Lafayette* was decided.

City of Lafayette did not completely prohibit municipalities from claiming the state action exemption. Instead, the plurality opinion suggested that the state action doctrine "exempts only anticompetitive conduct engaged in as an act of government . . . [by a political subdivision of the state] pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413. The opinion went on to explain:

> This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense . . . [A]n adequate state mandate for anticompetitive activities . . . exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated that kind of action complained of."

435 U.S. at 419 (citation omitted). Finally, "*City of Lafayette* suggested, without deciding the issue, that it would be sufficient to obtain *Parker* immunity for a municipality to show that it acted pursuant to a 'clearly articulated and affirmatively expressed . . . state policy' that was 'ac-

tively supervised' by the State." *Town of Hallie,* 105 S. Ct. at 1717, quoting *City of Lafayette,* 435 U.S. at 410.

Considerable debate ensued over what would constitute an adequate articulation and expression of state policy, and what would constitute active supervision. In *Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982), the Court held that a home rule provision of the Colorado Constitution which allocated only the most general authority to municipalities to govern local affairs did not satisfy the clear articulation component of the state action test. The opinion also suggested that whether active supervision by the state of the anticompetitive conduct was required was an open question, despite the plurality opinion in *City of Lafayette.* 455 U.S. at 51-52, n.14.

Noting that "[i]t is fair to say that our cases have not been entirely clear," 105 S.Ct. at 1720, the Court resolved much of the debate in *Town of Hallie.* A unanimous Court reiterated that the state action exemption applies whenever the state legislature has "clearly articulated and affirmatively expressed" a state policy to displace competition in the regulated area. *Id.* at 1719. The Court further held that "although compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to a clearly articulated state policy." *Id.* Finally, the Court concluded that the "active state supervision requirement should not be imposed in cases in which the actor is a municipality." *Id.*

The Fifth Circuit has applied *Town of Hallie* in a case which is virtually indistinguishable from the instant actions. In *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.,* 760 F.2d 607 (5th Cir. 1985), the City of Houston had entered into a contract with the Greater Houston Transportation Corporation by which the City granted an exclusive concession over passenger service at Houston Intercontinental Airport. Two

groups of taxicab owners and operators filed suit under the Sherman and Clayton Acts, seeking damages and injunctive relief from the City and its private contractor. The district court dismissed the complaint on defendants' motion for summary judgment, holding that the City was immune from antitrust scrutiny under the state action exemption and that the private contractor was immune under the *Noerr-Pennington* doctrine. The Fifth Circuit affirmed.

The Court's analysis focused on the relevant provision of the Texas Municipal Airport Act, which authorizes municipalities to establish and operate airports both within and without their boundaries. Article 46d-4 provides:

> (a) In operating an airport . . . such municipality may . . . enter into contracts . . . and other arrangement for a term not exceeding forty (40) years with any persons:
>
> . . .
>
> (2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport. . . .
>
> . . .
>
> In each case the municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services. . . .

Tex. Rev. Civ. Stat. Ann. art. 46d-4 (Vernon 1969). The Fifth Circuit said:

> While the latter provision falls short of expressly mentioning the establishment of ground transportation services, the statute's broad phrasing is a strong indication of the state's desire to abdicate in favor of municipal prescience with regard to airport management.
>
> This indication is all we require. . . . We think it . . . clear that the City of Houston might deem

> it most efficient to confer the privilege of airport taxicab operation on a single company, and that such a decision is a logical or reasonable consequence of the state's broad allocation of authority to the City to run its own airport.

760 F.2d at 610-11. The Fifth Circuit also disposed of the question concerning the impact of Article 46d-7(c)—a major stumbling block in the first district court opinion in this case, *see* 461 F.Supp. at 1031:

> Similarly, it is of limited significance that the statute authorizing municipal airport management states that the municipality's actions shall not be "inconsistent with, or contrary to, any Act of the Congress of the United States. . . ." [Article 46d-7(c).] The relevant question is not whether the City has transgressed federal law, but whether the Sherman & Clayton Acts apply to the City at all.

760 F.2d at 612, n.8.

Plaintiffs seek to distinguish *Independent Taxicab* on two grounds: (1) Houston Intercontinental is wholly owned and operated by the City of Houston, whereas the Dallas/Fort Worth Regional Airport is jointly owned and operated by the Cities of Dallas and Fort Worth, and (2) recent statutory amendments demonstrate that taxicab operations at jointly owned and operated airports were in a "regulatory void" until 1983.

The first argument is of no import. The Cities of Dallas and Fort Worth operate the airport through the Dallas/Fort Worth Regional Airport Board, a joint board created under § 14 of the Municipal Airport Act, Article 46d-14. That section provides, in relevant part:

> (a) For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality. . . .

> (b) Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint . . . operation of airports. . . . Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. . . .
>
> (c) . . . The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport . . . to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport. . . .

The Regional Airport Board is designed as a mechanism for joint action. That the defendant cities in these actions operated through the Regional Airport Board on a jointly owned airport, instead of on their own on individually owned airports, does not affect their state action exemption. "[T]he state's desire to abdicate in favor of municipal prescience with regard to airport management" is equally clear in both instances. The decision to grant an exclusive airport taxicab franchise—to utilize the "single-operator concept," in the parlance of these actions—is a logical and reasonable consequence of the State's broad allocation of authority to cities to jointly acquire, own and operate municipal airports.

Defendants second argument is based on legislation passed in 1983. The Obstruction to Air Navigation Control and Taxicab Licensing Act, 1983 Tex. Gen. Laws, ch. 626, at 4015, amended § 14 of the Municipal Airport Act to provide that:

> (d)(6) Taxicab Licensing. . . . [A] joint airport board . . . shall have power to license taxicabs picking up passengers at or delivering passengers to the airport.
>
> (7) Regulations. Any resolution, rules, regulations, or orders of the joint airport board dealing with subjects authorized by Subdivision (65) of this subsection become effective only upon approval of the governing bodies of the constituent public agencies.

Article 46d-14(d)(6)-(7) (Vernon Supp. 1985). While this statute was not enacted until well after the bulk of the actions challenged in these suits, it is significant as an indication of state policy, particularly when read in conjunction with § 2 of the Municipal Airport Act Amendments of 1983, 1983 Tex. Gen. Laws, ch. 978, at 5322, which provides:

> Any and all contracts, leases, or other arrangements for the use or occupancy of airport property executed by joint boards created under the Municipal Airports Act (Article 46d-1 et seq., Vernon's Texas Civil Statutes), and all provisions thereof, and executed prior to the effective date of this Act, are hereby validated and confirmed and the same are fully effective and represent the lawful agreements and undertakings of joint boards in accordance with the terms thereof.

From these enactments, Plaintiffs draw the conclusion that no governmental entity had any power to regulate taxicab service at the airport until September of 1983. The opposite is true.

The amendment to § 14 of the Municipal Airport Act was designed to clarify the role of joint airport boards in regulating taxicab service at joint airports because of uncertainties that might have arisen from concurrent legis-

lation which clarified the role of the Railroad Commission in establishing licensing requirements under the Motor Bus Act, Article 911a. See 1983 Tex. Gen. Laws, ch. 263, at 1161. This clarifying legislation does not suggest that no power to regulate existed before its enactment. The validating statute suggests just the opposite.

The plaintiffs' operations at the airport were limited because ground transportation service was provided by means of a single-operator concept. The Cities of Dallas and Fort Worth own the airport and, as noted above, operate it through the Dallas/Fort Worth Regional Airport Board. The Cities of Dallas and Fort Worth contracted with the Airport Board to provide ground transportation under the single-operator concept. To meet their obligations to the Board, the Cities of Dallas and Fort Worth formed an entity known as the D/FW Surtran System. The System then solicited bids for the provision of the taxicab component of the ground transportation services. Yellow Cab of Dallas and Fort Worth Cab & Baggage formed an entity known as Surtran Taxicab, Inc., which submitted the winning bid. The D/FW Surtran System then contracted with Surtran Taxicab, Inc., for the provision of taxicab service at the airport. The single-operator concept, then, originated in the first agreement between the Airport Board and the Cities of Dallas and Fort Worth. The 1983 validation statute confirms that, under state law, the single-operator concept was lawful.

For purposes of antitrust analysis, the validation statute itself, by validating and confirming the contracts in question, is an adequate indication of the state's desire to allow joint airport boards to displace competition through anticompetitive measures in the area of taxicab services to municipal airports.

The Court concludes that Plaintiffs' actions against the Cities of Dallas, Fort Worth, Grapevine and Irving should be dismissed because the challenged conduct is immune

from scrutiny under the antitrust laws by virtue of the state action exemption.

B. The Private Defendants

In a companion case to *Town of Hallie*, the Supreme Court outlined the criteria a private party must satisfy to fall within the state action exemption. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.' Second, the State must supervise actively any private anticompetitive conduct." *Southern Motor Carriers Rate Conference v. United States*, 105 S. Ct. 1721, 1727 (1985) (citations omitted). The Court explained the reason for extending the state action exemption to private parties:

> The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate domestic commerce. If *Parker* immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a State would be unable to implement programs that restrain competition among private parties. A plaintiff could frustrate any such programs merely by filing suit against the regulated private parties, rather than the state officials who implement the plan. We decline to reduce *Parker*'s holding to a formalism that would stand for little more than the proposition that Porter Brown sued the wrong parties.

Id. at 1726-27. Instead, "[t]he success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant." *Id.* at 1728.

The private defendants have met the first prong of the test. As discussed above, the single-operator concept re-

sulted from the state's clearly articulated and affirmatively expressed "desire to abdicate in favor of municipal prescience with regard to airport managment." 760 F.2d at 610. Because the Cities of Dallas and Fort Worth determined that the single-operator concept would be used at the airport and solicited bids only on this basis, it is fair to say that the private defendants, who simply submitted a bid, were compelled to participate in the anticompetitive activity if they wanted to provide taxicab service at the airport. As the Court said in *Southern Motor Carriers*, "compulsion often is the best evidence that the State has a clearly articulated and affirmatively expressed policy to displace competition." 105 S.Ct. at 1729.

The active supervision requirement—the second prong of the test—"prevents the state from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." *Id.* at 1729, quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). "[T]he state supervision requirement is intended to control the potential for abuse created by authorizing private persons to make anticompetitive decisions and to insure that those decisions are consistent with the clearly articulated and affirmatively expressed state policy at stake." *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1014 (8th Cir. 1983), *cert. denied*, 105 S. Ct. 1864 (1985).

Midcal involved a challenge to a California wholesale wine pricing system that the Court found resulted in a de facto resale price maintenance program. The Court held that the system was a clearly articulated state policy, but that it did not meet the active supervision requirement:

> The State simply author s price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor

> does it regulate the terms of fair trade contracts. The States does not monitor market conditions or engage in any "pointed reexamination" of the program.

455 U.S. at 105-106.

In the instant actions, there is no doubt that the Cities of Dallas and Fort Worth, and the Regional Airport Board, have actively supervised the private defendants' conduct. The details of taxicab service at the airport are set forth comprehensively in the contracts between D/FW Surtran System and Surtran Taxicabs, Inc., attached to the complaints. Further, the successive contracts show a gradually changing approach to ground transportation at the airport. For example, the 1979 Contract allows Surtran Taxicabs to subcontract with other taxicab companies for provision of service at the airport.

The Court concludes that the Plaintiffs' actions against the private defendants should be dismissed because the challenged conduct is immune from scrutiny under the antitrust laws by virtue of the state action exemption.

II. The Local Government Antitrust Act of 1984

The second question before the Court is whether the plaintiffs' claims for damages, interest on damages, costs and attorney's fees against the cities should, in the alternative, be dismissed under § 3 of the Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750 (Oct. 24, 1984) (to be codified in 15 U.S.C. § 35), which provides:

> (a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

> (b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

Section 3(b) of the Act "was a compromise between those Congressmen who thought that retroactive application was not in accord with Congress' traditional approach to changing existing law and those who felt that denial of retroactive application would unjustly penalize those localities that were defendants in pending suits for treble damages." *Jefferson Disposal Co. v. Parish of Jefferson*, 603 F.Supp. 1125, 1131 (E.D. La. 1985).

There is no dispute that these cases were commenced before the effective date of the act and that the cities of Dallas, Fort Worth, Grapevine and Irving are local governments within the meaning of § 2(1)(A) of the Act, 15 U.S.C. § 34(1)(A). The question, then, is whether it would be inequitable not to apply § 3(a) retroactively on the facts of these cases.

The Joint Explanatory Statement of the Conference Committee, which accompanied the Conference Report on the Bill, discusses the application of the Act to pending cases:

> The application to pending cases of the money damage protection afforded by § 3 will be based upon a case-by-case determination by the district court. The local government has the burden of proof to establish to the court's satisfaction that

> it would be inequitable not to apply this Act to the pending case. The court is to consider all relevant circumstances. The statute mentions two of the factors that the court should consider—stage of litigation and the availability of alternative relief under the Clayton Act. Where a pending case is in an early stage of litigation and where injunctive relief can remedy the problem, the defendant local government may be able more easily to sustain its burden. Where a case is in more advanced stages of litigation or where injunctive relief is unavailable or incomplete, the burden would become more difficult. If a case has progressed to or beyond a jury verdict or district court judgment, a local government defendant would need compelling equities on its side to justify the application of this section to the pending case.

Conference Report of H.R. 6027, 98th Cong., 2d Sess., 130 Cong. Rec. H11,850-51 (daily ed. Oct. 10, 1984). "This Statement makes clear that as either of the two factors specifically mentioned in § 3(b) of the Act (stage of litigation and availability of alternative relief under the Clayton Act) moves towards weighing against retroactive application, the defendant's burden to establish that denial of such application would be inequitable becomes more difficult." *Jefferson Disposal,* 603 F.Supp. at 1132.

In addition to the two factors listed in the statute—the stage of the litigation and the availability of alternative relief under the Clayton Act—the legislative history indicates that the Court should expressly consider at least three other factors in deciding the equity question:

> In making its determination as to whether a local government should be protected against damages in a currently pending case, however, the statement of managers specifically directs the court

> to consider all relevant circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act—that is, the injunction remedy. But public policy requires that the court's inquiry in such instances must not be limited solely to antitrust considerations in cases brought against local governments. Among the other relevant factors, the court should properly consider:
>
> First, whether the local government was acting within its normal legislative, regulatory, executive, administrative, or judicial authority;
>
> [S]econd, the financial harm which a treble damage award could inflict on the municipality and its taxpayers; and
>
> [T]hird, whether the municipal action was predicated on or in furtherance of Federal or State laws, policies or regulations.

130 Cong. Rec. H12,187 (daily ed. Oct. 11, 1984) (remarks of Rep. Fish). *Accord, id.* at H12,184 (remarks of Rep. Lungren). *But see id.* at S14,368 (remarks of Sen. Metzenbaum), *reprinted in Miami International Realty Co. v. Town of Mt. Crested Butte,* 607 F.Supp. 448, 452 n.2 (D. Colo. 1985) (additional factors suggested on the House floor do not reflect Congressional intent). The Court will consider the statutory factors first, then those suggested by the legislative debates.

The Stage of Litigation. This litigation is now seven years old, but chronological age is deceptive in this instance. These suits were filed in May and June of 1978. The initial motions to dismiss were filed on November 29, 1978. Discovery then went forward on the class certification issues, and on the merits from February, 1979, forward. The class certification hearing was held in October 1979. The Court's ruling on class certification was issued

December 31, 1980. Both cases were essentially dormant during the period the Court had the class certification issues under advisement.

The December 31, 1980, Order also denied the motion to intervene in the *Campisi (Woolen)* suit, which had been filed by some of the *Whorton* plaintiffs. Those plaintiffs appealed in January 1981. The Fifth Circuit's opinion was issued on August 30, 1982. The mandate was filed in the district court on September 27, 1982. No proceedings, other than those related to the appeal, took place during the pendency of the appeal.

After this case was remanded, the *Campisi* plaintiffs moved to modify the class certification order to certify a damages class and the *Whorton* plaintiffs moved to decertify the class. All parties filed statements concerning the future course this litigation should take. In the ensuing 2 1/2 years, though, no party has made any real effort to complete discovery and ready the case for trial on the merits.

The past 5 1/2 years has not been devoted to preparation for trial on the merits. Completion of pretrial discovery would take at least another year. Because the status of these actions has not changed since the effective date of the Act, the Court need not determine whether the appropriate date for assessing the stage of the litigation is the date of this Opinion or the date the Act took effect, September 24, 1984—30 days before its date of enactment under § 6 of the Act. *See Jefferson Disposal,* 603 F.Supp. at 1132 n.16.

The failure to complete pretrial discovery before the effective date of the Act is a significant indication that § 3(a) should be applied retroactively. *See* 130 Cong. Rec. H12,186 (daily ed. Oct. 11, 1984) (remarks of Rep. Hyde) (the fact that pretrial discovery has not been completed "is an important distinction between the first and second sentences of section 3(b) for purposes of retroactive ap-

plication"); *id.* at H12,187 (remarks of Rep. Rodino) (uncompleted pretrial discovery "is the essential difference made in the conference report between pending cases generally, and pending cases where a jury verdict or district court decision has been rendered.") Congressman Hyde and Rodino were floor managers for the Act. Their statements during the course of debate are particularly useful in determining Congress' intent. *Miami International Realty,* 607 F.Supp. at 452 n.2. The failure to complete discovery before the effective date of the Act has particular weight where, as here, major discovery remains to be conducted.

The Availability of Alternative Relief Under the Clayton Act. "[I]n looking to the availability of alternative relief under the Clayton Act, the court would assess whether a plaintiff could recover damages from a private party and whether an injunction would be sufficient to halt continuing injury caused by an ongoing antitrust violation." 130 Cong. Rec. S13,105 (daily ed. Oct. 4, 1984) (remarks of Sen. Cranston). *Contra Miami International Realty,* 607 F.Supp. at 454 ("the potential damage liability of other defendants should not enter into the calculus used in determining whether to apply § 3 to pending cases").

Both criteria are met in these cases.[2] Each case has three defendants which are not local governments—Surtran Taxicabs, Yellow Cab of Dallas, and Fort Worth Cab & Baggage Co.—and which could be held liable for money damages, if not otherwise exempt from the antitrust laws.

Any continuing injury could be halted with injunctive relief prohibiting the cities from excluding the plaintiffs from the outbound taxicab market at the airport, or other appropriate prohibitions. "Injunctive remedies under § 16

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[2] As an alternative ground for dismissal, this analysis proceeds as though the state action exemption did not apply, thus making the availability of alternative relief a reality.

[of the Clayton Act] may be as broad as necessary to ensure that 'threatened loss or damage' does not materialize or that prior violations do not recur." *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 925 (9th Cir. 1975).

Exercise of Normal Regulatory Authority & Action in Furtherance of State Law. As discussed in Part I of this Opinion, the cities were plainly exercising their normal regulatory authority and acting in furtherance of state law in their implementation of taxicab service at the airport.

Financial Harm of a Treble Damages Award. The combined actions seek actual damages of $7,000,000, which would be trebled to $21,000,000. Such an award inevitably would have an adverse impact even on these major cities, but they would not be crippled in their provision of services or forced into bankruptcy. The burden would also be shared by the three nonmunicipal defendants. The magnitude of any adverse consequences falls far short of those suggested as benchmarks in the House:

> [W]hether an adverse impact would be felt by the unit of local government and its residents because of the antitrust damage award . . . is important because certainly we do not want the antitrust laws of our country to result in insolvency with respect to our local governments, nor to intrude in such a way on local government that we do not have people coming forth to serve on local government out of fear of potential antitrust suits.

130 Cong. Rec. H12,184 (daily ed. Oct. 11, 1984) (remarks of Rep. Lungren). At the same time, "[i]t cannot be denied that a judgment of that magnitude would have an adverse impact on any community in this country and would be totally at odds with the spirit and intent of the Act." *Jefferson Disposal*, 603 F.Supp. at 1135.

Conclusion. The Court determines, in light of all the circumstances, that it would be inequitable not be apply § 3(a) of the Local Government Antitrust Act of 1984, 15 U.S.C. § 35(a), to this case. Plaintiffs' claims under § 4 of the Clayton Act, 15 U.S.C. § 15, for damages, interest on damages, costs, and attorney's fees against the Cities of Dallas, Fort Worth, Grapevine and Irving are dismissed on this additional ground. This dismissal does not affect Plaintiffs' claims for costs and attorney's fees under § 16 of the Clayton Act, 15 U.S.C. § 26, as the Act does not encompass them. *Jefferson Disposal,* 603 F.Supp. at 1133 n. 19.

Under the express language of § 4(b) of the Act, the relief provided to private litigants is not available to the private defendants in these actions because they were commenced before the effective date of the Act.

III. Noerr-Pennington

The private defendants have moved for summary judgment on the ground that their activities are immune from antitrust scrutiny under the *Noerr-Pennington* doctrine. See *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965).

"The *Noerr-Pennington* doctrine provides an exception to antitrust liability enabling citizens or business entities to influence or to petition public officials to take official action that will harm or eliminate competition." *Affiliated Capital Corp. v. City of Houston,* 735 F.2d 1555, 1566 (5th Cir. 1984) (en banc), *petition for cert. filed,* 105 S. Ct. 1164 (1984). The *Noerr-Pennington* doctrine stems from the First Amendment's guarantee of a right to assemble and petition the government. "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme,

itself violative of the Sherman Act." *Pennington,* 381 U.S. at 670. As the Court later said:

> [I]t would be destructive of rights of association and of petition to hold that groups with common interest may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interest vis-a-vis their competitors.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972).

However, "a defendant cannot rely on *Noerr-Pennington* immunity when the activity to influence government action is a mere sham to hide what is essentially an attempt to interfere with a competitor's business." *Affiliated Capital,* 735 F.2d at 1567. This sham exception may manifest itself in a variety of ways. *See Coastal States Marketing v. Hunt,* 694 F.2d 1358, 1371 n.42 (5th Cir. 1983); ABA Antitrust Section, Antitrust Law Developments 615-18 (2d ed. 1984). The plaintiffs in the instant actions have not suggested what variety of the sham exception they believe is applicable here.

Recognizing that "[a petitioning party] should enjoy petitioning immunity from the antitrust laws so long as a genuine desire for [governmental] relief is a significant motivating factor underlying [the petitioning activity]," the Fifth Circuit has said that the sham exception is initially established by a showing that the defendant's petitioning activity was "substantially" motivated by impermissible anticompetitive factors. If this showing is made, the defendant must demonstrate to the satisfaction of the trier of fact that the defendant's petitioning activity was "substantially" motivated by a hope of governmental relief. If the defendant discharges this burden, "[n]othing more is

required to bring the case within the immunity." *Coastal States Marketing,* 694 F.2d at 1372 & n.45.

The summary judgment record in this case discloses no genuine issue as to any facts material to determination of the *Noerr-Pennington* question. The undisputed facts demonstrate that the private defendants are entitled to summary judgment by virtue of the *Noerr-Pennington* doctrine. The same comments made by the Fifth Circuit in *Independent Taxicab* apply here:

> Viewing the record in the light most favorable to [plaintiffs], the most that can be said is that [the private defendants] secured from the [Regional Airport Board] an exclusive concession whose anticompetitive effects stem primarily from a valid municipal, and vicariously state, policy. It would be anomalous to hold on the one hand that government can contract with private entities to effectuate valid, albeit anticompetitive, policies, while holding on the other hand that private entities cannot petition government to participate in the public endeavor.

760 F.2d at 613.

> This result is compelled if *Noerr-Pennington* protection is to have meaning in the context of agreements with the government. First Amendment petitioning privileges would indeed be hollow if upon achieving a petitioned-for end the petitioner were then subjected to antitrust liability for his success.

Greenwood Utilities Commission v. Mississippi Power Company, 751 F.2d 1484, 1505 (5th Cir. 1985).

The single-operator concept, which is at the heart of Plaintiffs' claims, apparently originated in an independent consultant's report prepared for the Cities of Dallas and Fort Worth in 1964. Even if the private defendants ac-

tively lobbied for implementation of the single-operator concept and vigorously pressed their views concerning criteria the successful bidder would have to meet in such areas as minimum insurance coverage and fleet size, *Noerr-Pennington* would apply because these activities plainly were not a sham. Plaintiffs' alleged injuries were caused by the governmental action which the private defendants genuinely attempted to secure and succeeded in securing. *See In re Airport Car Rental Antitrust Litigation,* 521 F.Supp. 568, 587-90 (N.D. Cal. 1981), *aff'd,* 693 F.2d 84 (9th Cir. 1982), *cert. denied,* 103 S.Ct. 3114 (1983).

Plaintiffs' contention that the private defendants' actions fall within the co-conspirator exception to the *Noerr-Pennington* doctrine is without merit. Viewing the summary judgment record in the light most favorable to plaintiffs, the most that has been shown is mere adoption by the cities of some of the private defendants' proposals. The record shows that while some of the private defendants' suggestions were adopted, the general concept and specific details of taxicab service at the airport were closely scrutinized and extensively debated by a variety of public and private entities. There is no evidence of a conspiracy. See *Affiliated Capital Corp. v. City of Houston,* 519 F.Supp. 991, 1016-23 (S.D. Tex. 1981), *adopted in relevant part,* 735 F.2d at 1567 (applying co-conspirator exception where the evidence revealed "active participation and orchestration by public officials in an anticompetitive agreement").

The Court concludes that the plaintiffs' claims against the private defendants should also be dismissed as barred under the *Noerr-Pennington* doctrine.

IV. The Civil Rights Claim

In their First Amended Complaint, filed May 17, 1985, the *Whorton* plaintiffs allege that the defendants' conduct constituted "a discrimination against the rights of the Plaintiffs under the Civil Rights Act and the Constitution

of the United States." *Id.* ¶ 17, at 9. The *Whorton* plaintiffs have not further elaborated on this cause of action in any document filed with the Court, nor have they identified what statute they purport to sue under.

This alleged civil rights claim based on discrimination has no plausible foundation and is wholly insubstantial and frivolous. It is dismissed for want of subject matter jurisdiction. Rule 12(b)(1). *See Williamson v. Tucker*, 632 F.2d 579, 590-91 (5th Cir. 1980) (discussion of applicable standards). In the alternative, the civil rights claim is dismissed for failure to state a claim upon which relief can be granted. Rule 12(b)(6).

V. Summary of Holdings

1. Plaintiffs' antitrust claims are DISMISSED because the Defendants' challenged activities are immune from scrutiny under the antitrust laws by virtue of the state action exemption.

2. Plaintiffs' antitrust claims under § 4 of the Clayton Act for damages, interest on damages, costs and attorney's fees against the Defendant cities are DISMISSED under § 3 of the Local Government Antitrust Act of 1984 because, in light of all the circumstances, it would be inequitable not to apply § 3(a) of the Act to this case.

3. Plaintiffs' antitrust claims against the private Defendants are DISMISSED as barred under the *Noerr-Pennington* doctrine.

4. The *Whorton* Plaintiffs' civil rights claim is DISMISSED for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

5. This Order disposes of all pending claims in this litigation. Judgment will be entered accordingly.

It is so ORDERED.

ENTERED this 8th day of August, 1985.

/s/ MARY LOU ROBINSON
MARY LOU ROBINSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-78-609
CONSOLIDATED WITH:
CIVIL ACTION NO. CA-3-78-745

JOHN WOOLEN, *et al.*

Plaintiffs,

v.

SURTRAN TAXICABS, INC., *et al.*,

Defendants.

FILED
AUG 8 1985

ORDER OF DISMISSAL

Civil action nos. 3-78-609 and 3-78-745 are dismissed.

It is so ORDERED.

ENTERED this 8th day of August, 1985.

/s/ MARY LOU ROBINSON
MARY LOU ROBINSON
United States District Judge

APPENDIX B

LOCAL GOVERNMENT ANTITRUST ACT OF 1984

PUBLIC LAW 98-544 [H.R. 6027]; October 24, 1984

LOCAL GOVERNMENT ANTITRUST ACT OF 1984

For Legislative History of Act, see Pamphlet No. 10A
An Act to clarify the application of the Clayton Act to the official conduct of local government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Local Government Antitrust Act of 1984".

SEC. 2. For purposes of this Act—

(1) the term "local government" means—

(A) a city,county, parish, town, township, village, or any other general function governmental unit established by State law, or

(B) a school district, sanitary district, or any other special function governmental unit established by State law in one or more States,

(2) the term "person" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(A)), but does not include any local government as defined in paragraph (1) of this section, and

(3) the term "State" has the meaning given it in section 4G(2) of the Clayton Act (15 U.S.C. 15g(2)).

SEC. 3. (a) No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply to cases commenced before the effective date of this Act unless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.

SEC. 4. (a) No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) in any claim against a person based on any official action directed by a local government, or official or employee thereof acting in an official capacity.

(b) Subsection (a) shall not apply with respect to cases commenced before the effective date of this Act.

SEC. 5. Section 510 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1985 (Public Law 98-411), is repealed.

SEC. 6. This Act shall take effect thirty days before the date of the enactment of this Act.

Approved October 24, 1984.

APPENDIX C

STATE STATUTES
APP. C-I

TEXAS MUNICIPAL AIRPORTS ACT
(As Amended, 1985)

Art. 46d-4. Operation and use privileges

(a) Under Municipal Operation. In operating an airport or air navigation facility owned, leased or controlled by a municipality, such municipality may, except as may be limited by the terms and conditions of any grant, loan, or agreement pursuant to Section 12 of this Act,[1] enter into contracts, leases and other arrangements for a term not exceeding forty (40) years with any persons:

(1) granting the privilege of using or improving such airport or air navigation facility or any portion or facility thereof, or space therein for commercial purposes;

(2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport or air navigation facility.

(3) making available services to be furnished by the municipality or its agents at such airport or air navigation facility.

In each case the municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services, which shall be reasonable and uniform for the same class of privilege or service and shall be established with due regard to the property and improvements used and the expenses of operation to the municipality.

(b) Under Other Operation. Except as may be limited by the terms and conditions of any grant, loan, or agree-

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[1] Article 46d-12.

ment pursuant to Section 12 of this Act, a municipality may be contract, lease or other arrangement, upon a consideration fixed by it, grant to any qualified person for a term not to exceed forty (40) years the privilege of operating, as agent of the municipality or otherwise, any airport owned or controlled by the municipality; provided that no such person shall be granted any authority to operate the airport other than a public airport or to enter into any contracts, leases or other agreements in connection with the operation of the airport which the municipality might not have undertaken under Subsection (a) of this Section.

Acts 1947, 50th Leg., p. 185, ch. 114, § 4.

APP. C-II

TEXAS MUNICIPAL AIRPORTS ACT (1947)

Art. 46d-14. Joint operations

(a) Authorization. For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality, as defined in this Act,[1] any agency of the State government and of the United States, and any municipality, political subdivision and agency of another State; and the term "governing body" means the governing body of a county or municipality, and the head of the agency if the public agency is other than a county or municipality. All powers, privileges and authority granted to any municipality by this Act may be exercised and enjoyed jointly with any public agency of any other State or of the United States to the extent that the laws of such other State or of the United States permit such joint exercise or enjoyment. If not otherwise authorized by law, any agency of the State government when acting jointly with any municipality, may exercise and enjoy all of the powers, privileges and authority conferred by this Act upon a municipality.

(b) Agreement. Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two (2) or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint acquisition and operation of airports and air navigation facilities. Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. Each such agreement shall specify its duration, the proportionate interest which each public agency shall have in

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[1] Article 46d-1 to 46d-22.

the property, facilities and privileges involved, the proportion to be borne by each public agency of preliminary costs and cost of acquisition, establishment, construction, enlargement, improvement, and equipment of the airport or air navigation facility, the proportion of the expenses of maintenance, operation, regulation and protection thereof to be borne by each and such other terms as are required by the provisions of this Section. The agreement may also provide for: amendments thereof, and conditions and methods of termination of the agreement; the disposal of all or any of the property, facilities and privileges jointly owned, prior to or upon said property, facilities and privileges, or any part thereof, ceasing to be used for the purposes provided in this Act, or upon termination of the agreement; the distribution of the proceeds received upon any such disposal, and of any funds or other property jointly owned and undisposed of; the assumption or payment of any indebtedness arising from the joint venture which remains unpaid upon the disposal of all assets or upon a termination of the agreement; and such other provisions as may be necessary or convenient.

(c) Joint Board. Public agencies acting jointly pursuant to this Section shall create a joint board which shall consist of members appointed by the governing body of each participating public agency. The number to be appointed, their term and compensation, if any, shall be provided for in the joint agreement. Each such joint board shall organize, select officers for terms to be fixed by the agreement, and adopt and amend from time to time rules for its own procedure. The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport or air navigation facility or airport hazard to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport, air

navigation facility or airport hazard, subject to the limitations of Subsection (d) of this Section.

(d) Limitations on Joint Board.

(1) Expenditures. The total expenditures to be made by the joint board for any purpose in any calendar year shall be determined by a budget approved by the governing bodies of its constituent public agencies on or before the preceding December 1st.

(2) Acquisitions Beyond Sums Allotted. No airport, air navigation facility, airport hazard, or real or personal property, the cost of which is in excess of sums therefor fixed by the joint agreement or allotted in the annual budget, may be acquired by the joint board without the approval of the governing bodies of its constituent public agencies.

(3) Eminent Domain. Eminent domain proceedings under this Section may be instituted only by authority of the governing bodies of the constituent public agencies of the joint board. If so authorized, such proceedings shall be instituted in the names of the constituent public agencies jointly, and the property so acquired shall be held by said public agencies as tenants in common until conveyed by them to the joint board.

(4) Disposal of Real Property. The joint board shall not dispose of any airport, air navigation facility or real property under its jurisdiction except with the consent of the governing bodies of its constituent public agencies, provided that the joint board may, without such consent, enter into the contract, lease or other arrangements contemplated by Section 4 of this Act.[2]

(5) Police Regulations. Any resolutions, rules, regulations or orders of the joint board dealing with subjects authorized by Section 7 of this Act[3] shall become effective

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[2] Article 46d-4.

[3] Article 46d-7.

only upon approval of the governing bodies of the constituent public agencies provided that upon such approval, the resolutions, rules, regulations or orders of the joint board shall have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations or orders of each public agency would have in its own territory or jurisdiction.

(e) Joint Fund. For the purpose of providing a joint board with moneys for the necessary expenditures in carrying out the provisions of this Section, a joint fund shall be created and maintained, into which shall be deposited the share of each of the constituent public agencies as provided by the joint agreement. Each of the constituent public agencies shall provide its share of the fund from sources available to each. Any Federal, State or other contributions or loans, and the revenues obtained from the joint ownership, control and operation of any airport or air navigation facility under the jurisdiction of the joint board shall be paid into the joint fund. Disbursements from such fund shall be made by order of the board, subject to the limitations prescribed in Subsection (d) of this Section.

Acts 1947, 50th Leg., p. 188, ch. 114, § 14.

APP. C-III

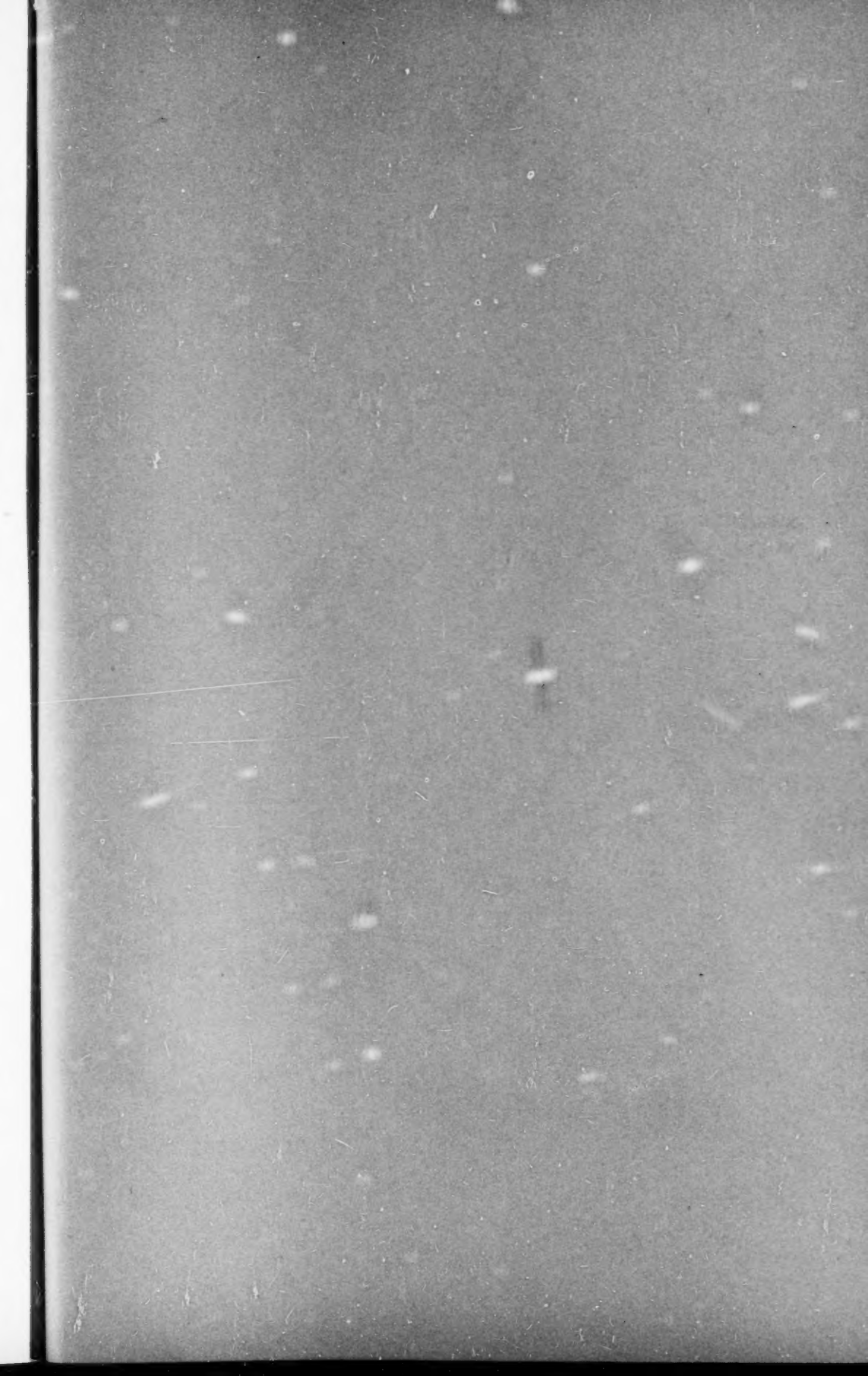
TEXAS HOME RULE ACT
(1913)

Art. 1175. Enumerated powers

Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty:

20. To license, operate and control the operation of all character of vehicles using the public streets, including motorcycles, automobiles or like vehicles, and to prescribe the speed of the same, the qualification of the operator of the same, and the lighting of the same by night and to provide for the giving bond or other security for the operation of the same.

21. To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire or the transportation of freight for hire on the public streets and alleys of the city.



Supreme Court, U.S.
FILED
FEB 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1045

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CARL WHORTON, et al.,
Petitioners,
vs.
SURTRAN TAXICABS, INC., et al.,
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT CITY OF GRAPEVINE, TEXAS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTIONS PRESENTED

I. In ruling that the municipal and private respondents' activities were immune from antitrust scrutiny by virtue of the state action exemption, did the district court and the Fifth Circuit respectively render and adopt a decision, based in part upon a validating state statute, which conflicted with applicable decisions of this Court or other federal courts of appeal?

II. Was the decision to retroactively apply the Local Government Antitrust Act of 1984, thereby precluding recovery against the cities under the Clayton Act for damages, interest on damages, costs and attorneys' fees, clearly erroneous?

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No. 86-1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CARL WHORTON, et al.,
Petitioners,

vs.

SURTRAN TAXICABS, INC., et al.,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT CITY OF GRAPEVINE, TEXAS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF SAID COURT:

Respondent City of Grapevine, Texas, respectfully submits the following brief in opposition to the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas, which dismissed all claims in this litigation, is reported at 615 F.Supp. 344 (1985), and appears as Appendix A to the per curiam opinion of the United States Court of Appeals for the Fifth Circuit, reported at 801 F.2d 159 (1986). That per curiam opinion, which affirmed the judgment of the district court, is attached as Appendix A to the petition for writ of certiorari.

RELEVANT STATUTORY PROVISIONS

The following statutory provisions, omitted from the petition for writ of certiorari, are relevant for this Court's consideration:

Tex.Rev.Civ.Stat.Ann. art 46d-14(a), (b) and (c) (Vernon 1969) (Texas Municipal Airports Act).

Tex.Rev.Civ.Stat.Ann. art. 1175 (20) and (21) (Vernon 1963).

Relevant portions appear herein at Appendix A.

STATEMENT OF THE CASE

Although Petitioners' recitation of the Statement of the Case is reasonably accurate, it wholly fails to address or even cite the cornerstone of the district court's opinion dismissing the action, Tex.Rev.Civ.Stat.Ann. art. 1175 (20) and (21) (Vernon 1963) and Tex.Rev.Civ.Stat.Ann. art. 46d-14(a), (b) and (c) (Vernon 1969) (Texas Municipal Airports Act).

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be denied because the district court's opinion, affirmed by the Fifth Circuit, employed the appropriate foreseeability standard

urged herein by Petitioners (hereafter "Whorton") and established by this Court in *Town of Hallie v. City of Eau Claire*, 471 U.S. ____, 85 L.Ed.2d 24, 105 S. Ct. 1713 (1985). In concurring with the post-*Town of Hallie*, Fifth Circuit analysis in *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir.), *cert. denied*, ____ U.S. ____, 88 L.Ed.2d 230 (1985), a case involving an exclusive taxicab franchise at the City of Houston airport, the district court discerned a "clearly articulated and affirmatively expressed state policy" as evidenced by the Texas home rule statute and the Texas Municipal Airports Act, both in existence before the inception of the complained of activities at the Dallas/Fort Worth Regional (hereafter "D/FW") Airport. The broad phrasing of the statutory language was a strong indication of the state's desire to give its cities the authority to manage and operate their airports, including ground transportation services. The district court correctly concluded that the displacement of competition through anticompetitive measures in the area of taxicab services to municipal airports was a logical and reasonable consequence of the allocation of this authority, and that the cities were immune from liability by virtue of the state action exemption.

Whorton also contends that the Local Government Antitrust Act of 1984 did not authorize the district court to consider alternative relief against the private respondents as a ground for denying relief against the cities, and that the fashioning of an alternative equitable remedy against the cities should have been a prerequisite to the retroactive grant of immunity to those same parties. Whorton cannot succeed here because this argument, not having been raised before the Fifth Circuit, has not been preserved for review by this Court. His theory also is substantively unpersuasive because the plain language of the Act instructs the court to

consider the application of the Act "in light of all the circumstances," which was done in this instance. Finally, the invalidity of Whorton's proposition notwithstanding, this aspect of the district court's decision could at most constitute harmless error, because the dismissal of the cities pursuant to the Act was effected independent of the state action exemption doctrine. The petition for writ of certiorari should be denied.

ARGUMENT AND AUTHORITIES

I. IN HOLDING THAT THE MUNICIPAL AND PRIVATE RESPONDENTS' ACTIVITIES WERE IMMUNE FROM ANTITRUST SCRUTINY BY VIRTUE OF THE STATE ACTION EXEMPTION, THE DISTRICT COURT AND THE FIFTH CIRCUIT FOLLOWED THE FORESEEABILITY TEST ESTABLISHED IN *TOWN OF HALLIE,* AND RELIED UPON RELEVANT STATE POLICY WHICH EXISTED PRIOR TO THE COMPLAINED OF ACTIVITIES.

In *Parker v. Brown,* 317 U.S. 341, 87 L.Ed.2d 315, 63 S.Ct. 307 (1943), the Supreme Court established that the Sherman Act did not apply to the anticompetitive conduct of a state acting through its legislature. *Id.* at 350-51. More recently, this Court unanimously decided that the state action exemption applies to municipalities whenever the state legislature has "clearly articulated and affirmatively expressed" a state policy to displace competition in a regulated area, that is, whenever "the legislature contemplated the kind of action complained of." *Town of Hallie, supra. See also Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48, 85 L.Ed.2d 36, 105 S.Ct. 1721 (1985). Putting to rest any ambiguity which may have arisen following its decisions in this area during the previous decade,

see, e.g., City of Lafayette, Louisiana v. Louisiana Power & Light Co., 435 U.S. 389, 55 L.Ed.2d 364, 98 S.Ct. 1123 (1978), *Community Communications Co. v. City of Boulder, Colorado*, 455 U.S. 40, 70 L.Ed.2d 810, 102 S.Ct. 835 (1982), the Court emphasized that "compulsion affirmatively expressed . . . is by no means a prerequisite to a finding that a municipality acted pursuant to a clearly articulated state policy," and that "the active state supervision requirement should not be imposed in cases in which the actor is a municipality." *Town of Hallie*, 471 U.S. at ____ , 85 L.Ed.2d at 33-34.

In *Independent Taxicab, supra,* a case appropriately deemed "virtually indistinguishable" by the district court in the instant action, *Woolen v. Surtran Taxicabs, Inc.*, 615 F.Supp. 344, 346 (N.D. Tex 1985), *aff'd per curiam*, 801 F.2d 159, 161 (5th Cir. 1986), the Fifth Circuit upheld the lower court's dismissal of all antitrust claims where the City of Houston had granted a taxicab company exclusive dominion over passenger service at the airport. The Court's analysis focused upon the relevant provisions of the Texas home rule statute, Tex.Rev.Civ.Stat.Ann. art. 1175 (20) and (21) (Vernon 1963), and the Texas Municipal Airports Act, Tex.Rev.Civ.Stat.Ann. art 46d-1, et seq. (Vernon 1969), which pursuant to *Town of Hallie, supra,* provided the clearly articulated and affirmatively expressed state policy of deference to "municipal prescience with regard to airport management." *Independent Taxicab,* 760 F.2d at 610.

As viewed by the Court, the state legislature had granted its cities extensive regulatory authority over the taxicab industry within and without city limits, including the power to "license and fix the charges or fares" for all transportation for hire. Tex.Rev.Civ.Stat.Ann. art 1175 (20) and (21). *See also Independent Taxicab,* 760 F.2d at 610. More

specifically, however, art. 46d-4 of the Texas Municipal Airports Act, enacted in 1947, conferred upon cities the authority to "enter into contracts, leases and other arrangements" for the provision of "goods, commodities, things, services or facilities" at municipal airports. A municipality was further authorized to "establish the terms and conditions and fix the charges, rentals or fees for the privileges or services." Tex.Rev.Civ.Stat.Ann art. 46d-4(a)(2). The Fifth Circuit found the broad phrasing of these statutes to be a strong and legally sufficient indication of the state's desire to allocate authority to Texas cities to manage their airports. *Independent Taxicab,* 760 F.2d at 610-11.

In refuting the "regulatory void" argument asserted by Whorton in the present action, the district court scrutinized and relied upon this same body of statutory law, in existence before this lawsuit began, and interpreted it in light of the most recent pronouncements of this Court and the Fifth Circuit. The court also considered validating legislation passed in 1983 as an additional basis in support of its decision, which Whorton mischaracterizes both as a newly created, jurisprudentially repugnant "retroactive test of ratification" (Pet. at 7), and as the *sine qua non* of the court's rationale (Pet. at 8-9).

The court reviewed § 14 of the Municipal Airports Act, which was amended in 1983 to provide as follows:

> (d)(6) Taxicab Licensing. A joint airport board established pursuant to this Act shall have power to license taxicabs picking up passengers at or delivering passengers to the airport.
>
> (7) Regulations. Any resolutions, rules, regulations, or orders of the joint airport board dealing with subjects

> authorized by Subdivision (65) of this subsection become effective only upon approval of the governing bodies of the constituent public agencies.

Tex.Rev.Civ.Stat.Ann. art 46d-14(d)(6) and (7) (Vernon Supp. 1985). This legislation was cited as an obvious indication of state policy, particularly so when considered in conjunction with § 2 of the Municipal Airports Act Amendments of 1983, 1983 Tex.Gen. Laws, ch. 978, at 5322:

> Any and all contracts, leases, or other arrangements for the use or occupancy of airport property executed by joint boards created under the Municipal Airports Act (Art. 46d-1 et seq., Vernon's Texas Civil Statutes), and all provisions thereof, and executed prior to the effective date of this Act, are hereby validated and confirmed and the same are fully effective and represent the lawful agreements and undertakings of joint boards in accordance with the terms thereof.

Despite Whorton's contention that governmental entities were without power to regulate taxicab service at D/FW Airport before § 14 was amended in 1983, the opposite is true. That amendment clarified the role of joint airport boards in regulating taxicab service at joint airports because of uncertainties which may have existed from concurrent legislation concerning the role of the Railroad Commission in establishing licensing requirements pursuant to Tex.Rev.Civ.Stat.Ann. art. 911a (Texas Motor Bus Act). By validating and confirming a joint board's power to regulate prior to that legislation's amendment, the state recognized the existence of such power, effectively vitiating Whorton's "regulatory void" argument.

The court noted the unwavering validity of D/FW Airport's single-operator concept, born of the original

agreement between the Airport Board and the Cities of Dallas and Fort Worth. As the court concluded on this issue,

> the validation statute, by validating and confirming the contracts in question, is an adequate indication of the state's desire to allow joint airport boards to displace competition through anticompetitive measures in the area of taxicab services to municipal airports.

Woolen v. Surtran Taxicabs, Inc., 801 F.2d at 163.

Whorton mistakenly contends that the Fifth Circuit has adopted an impermissible, exclusive retroactive test in determining whether state action immunity applies to local governments, and fails to accurately present the essential legislative basis upon which the district court relied. Both the statutory law preexisting the complained of activity as well as clarifying legislation enacted after the institution of the lawsuit were considered by the court. This thoughtful approach cannot be characterized as either improper or unique. *See Campbell v. City of Chicago,* 639 F.Supp. 1501, 1507-08, n. 10 (N.D. Ill. 1986) (legislation enacted after complaint filed in taxicab antitrust lawsuit cited as "useful and relevant in understanding the legislative meaning" of authorizing provision). This Circuit's test remains one based upon a standard of foreseeability, and is consonant with the standard established by this Court and followed by other federal courts of appeal. *See Mercy-Peninsula Ambulance v. San Mateo County,* 791 F.2d 755, 756-57 (9th Cir. 1986); *Cine 42nd Street Theater Corp. v. Nederland Org.,* 790 F.2d 1032, 1038-44 (2nd Cir. 1986); *Auton v. Dade City, Florida,* 783 F.2d 1009, 1010 (11th Cir. 1986); *LaSalle Nat'l. Bank of Chicago v. County of DuPage,* 777 F.2d 377, 380-81 (7th Cir. 1985), *cert. denied,* __U.S.__, 90 L.Ed.2d 979 (1986); *Massachusetts Furniture & Piano Movers Ass'n. v. F.T.C.,* 773

F.2d 391, 394-95 (1st Cir. 1985); *L & H Sanitation v. Lake City Sanitation,* 769 F.2d 517, 520-21 (8th Cir. 1985). The petition for writ of certiorari should be denied. *See* U.S. Sup. Ct. Rules 17.1 and 21.5, 28 U.S.C.

II. NO GROUND EXISTS FOR REVIEW OF THE RETROACTIVE APPLICATION OF THE LOCAL GOVERNMENT ANTITRUST ACT OF 1984 BECAUSE WHORTON FAILED TO PRESERVE THIS ISSUE ON APPEAL, AND THE DISTRICT COURT PROPERLY CONSIDERED ALL RELEVANT CIRCUMSTANCES IN ACCORDANCE WITH THE CLEAR LANGUAGE OF THE ACT.

Whorton proposes that the Fifth Circuit's judgment is reviewable because the adoption of the district court's reasoning was erroneous in two respects relative to the application of the Local Government Antitrust Act of 1984, 15 U.S.C. §35 (hereafter "the Act"). The Act provides that local governments shall be immune from payment of damages, costs or attorneys' fees for antitrust violations. 15 U.S.C. §35(a). It is not applicable to cases commenced prior to September 24, 1984 unless "it would be inequitable not to apply [the Act] to a pending case." 15 U.S.C. §35(b).

Whorton urges first that an erroneous legal standard was employed by weighing alternative relief against the private respondents as a ground for denying total relief against the cities (Pet. at 15-16), and secondly that the proper construction of the Act would be to fashion an appropriate retrospective equitable remedy against the cities as an equitable condition to the retroactive grant of immunity from the damages remedy (Pet. at 18).

Whorton's argument must fail for three reasons. These issues were neither raised nor briefed before the Fifth Circuit and therefore have not been properly preserved for

review by this Court. Furthermore, because the district court's analysis proceeded as though the state action exemption did not apply, thereby making the availability of alternative relief pursuant to the Act a reality as an alternative ground for dismissal, the basis of that aspect of the decision could present at most harmless error. Finally, the cities sustained their burden of proof that it would be inequitable not to apply subsection (a) of the Act "in light of all the circumstances." *See* 15 U.S.C. §35(b).

It is well established that an issue not raised before and addressed by a federal court of appeals is not preserved for review by this Court. *E.E.O.C. v. F.L.R.A.*, __U.S.__, 90 L.Ed.2d 19, 24, 106 S.Ct. 1678 (1986); *Rogers v. Lodge,* 458 U.S. 613, 628, n. 10, 73 L.Ed.2d 1012, 1025, 102 S.Ct. 3272, 3281 (1982). A liberal reading of the Whorton appellate brief before the Fifth Circuit fails to evince the argument now raised by the petition. Consequently, Whorton has waived his right to present this argument to the Court.

Even should this Court for the moment look beyond the inherent procedural deficiency attendant to Whorton's argument, review is not proper because the district court's decision not to award damages against the cities was an alternative and not an exclusive basis for dismissal. Such decision would constitute at most harmless error, and therefore is not clearly erroneous.

The most important aspect, however, for this Court's consideration is that the "careful opinion" of the district court, *Woolen v. Surtran Taxicabs, Inc.*, 801 F.2d at 159, was proper and extremely thorough in its review of all relevant circumstances, including the stage of the litigation, the availability of alternative relief under the Clayton Act, the cities' exercise of normal regulatory authority pursuant to

state law, and the financial harm of a potential treble damages award. The municipal respondents sustained their burden by showing that merits discovery had not been completed in 1985, as Whorton concedes, *see* Pet. at 15, n. 2, that completion of pretrial discovery would take "at least another year," *Woolen v. Surtran Taxicabs, Inc.*, 801 F.2d at 166, and that none of the prima facie exceptions to retroactive application was present in this case. The Court also determined that the Act was applicable because Whorton was not without potential alternative relief under the Clayton Act if the municipal respondents were dismissed from the case. The private respondents would remain and could be held liable for monetary damages, provided they were not otherwise exempt from the antitrust laws. *See, e.g., Pontarelli Limousine, Inc. v. City of Chicago,* 623 F.Supp. 281, 283 (D.C. Ill. 1985); *S. Kane & Son, Inc. v. W. R. Grace & Co.*, 623 F.Supp. 162, 163 (E.D. Pa. 1985); *TCI Cablevision, Inc. v. City of Jefferson, Missouri,* 604 F.Supp. 845, 846 (W.D. Mo. 1984). Furthermore, injunctive relief still would be available against the municipal respondents if they excluded the cab drivers from participating in picking up passengers at D/FW Airport.

Additional support for retroactively applying the Act was based upon the fact that the cities plainly were exercising their normal regulatory authority and were acting in furtherance of state law in implementing the challenged system. The district court also accurately observed that a potential $7,000,000 actual damages award trebled by law to $21,000,000, exclusive of interest, costs and attorneys' fees, even if shared with the private respondents, would have "an adverse impact on any community in this country and would be totally at odds with the spirit and intent of the Act." *Woolen v. Surtran Taxicabs, Inc.*, 801 F.2d at 167, quoting

Jefferson Disposal Co. v. Parish of Jefferson, Louisiana, 603 F.Supp. 1125, 1135 (E.D. La. 1985). The determination that it would be inequitable not to apply subsection (a) of the Act was proper.

The construction of the Act which Whorton now proposes finds absolutely no support in the plain language or the legislative history of the Act, *see Woolen v. Surtran Taxicabs, Inc.*, 801 F.2d at 166-67, or in *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975), a case cited as authority by Whorton which fails to mention the Act and instead discusses the relief available to a class certified pursuant to Fed.R.Civ.P. 23(b)(2) in a Title VII sexual discrimination case.

Whorton's theory of municipal immunity based solely upon preexisting alternative equitable relief against the local government cannot be entertained because it was not properly preserved for review by this Court. Alternatively, the argument must fail because it has no substantive merit. The district court's finding as affirmed by the Fifth Circuit was not clearly erroneous, and should be upheld.

CONCLUSION AND PRAYER

For the above reasons, Respondent City of Grapevine, Texas respectfully prays that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

LIST OF RELEVANT STATUTES

TEXAS MUNICIPAL AIRPORTS ACT
(Enacted 1947, effective until 1981 amendment)

Art. 46d-14. Joint operations.

(a) Authorization. For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality, as defined in this Act,[1] any agency of the State government and of the United States, and any municipality, political subdivision and agency of another State; and the term "governing body" means the governing body of a county or municipality, and the head of the agency if the public agency is other than a county or municipality. All powers, privileges and authority granted to any municipality by this Act may be exercised and enjoyed jointly with any public agency of any other State or of the United States to the extent that the laws of such other State or of the United States permit such joint exercise or enjoyment. If not otherwise authorized by law, any agency of the State government when acting jointly with any municipality, may exercise and enjoy all of the powers, privileges and authority conferred by this Act upon a municipality.

(b) Agreement. Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two (2) or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint acquisition and operation of airports and air navigation facilities. Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. Each such agreement shall specify its duration, the proportionate interest which each public agency shall have in the property, facilities

[1]Articles 46d-1 to 46d-22.

and privileges involved, the proportion to be borne by each public agency of preliminary costs and costs of acquisition, establishment, construction, enlargement, improvement, and equipment of the airport or air navigation facility, the proportion of the expenses of maintenance, operation, regulation and protection thereof to be borne by each and such other terms as are required by the provisions of this Section. The agreement may also provide for: amendments thereof, and conditions and methods of termination of the agreement; the disposal of all or any of the property, facilities and privileges jointly owned, prior to or upon said property, facilities and privileges, or any part thereof, ceasing to be used for the purposes provided in this Act, or upon termination of the agreement; the distribution of the proceeds received upon any such disposal, and of any funds or other property jointly owned and undisposed of; the assumption or payment of any indebtedness arising from the joint venture which remains unpaid upon the disposal of all assets or upon a termination of the agreement; and such other provisions as may be necessary or convenient.

(c) Joint Board. Public agencies acting jointly pursuant to this Section shall create a joint board which shall consist of members appointed by the governing body of each participating public agency. The number to be appointed, their term and compensation, if any, shall be provided for in the joint agreement. Each such joint board shall organize, select officers for terms to be fixed by the agreement, and adopt and amend from time to time rules for its own procedure. The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport or air navigation facility or airport hazard to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport, air navigation facility or airport hazard, subject to the limitations of Subsection (d) of this Section.

(d) Limitations on Joint Board.

(1) Expenditures. The total expenditures to be made by the joint board for any purpose in any calendar year shall be determined by a budget approved by the governing bodies of its constituent public agencies on or before the preceding December 1st.

(2) Acquisitions Beyond Sums Allotted. No airport, air navigation facility, airport hazard, or real or personal property, the cost of which is in excess of sums therefor fixed by the joint agreement or allotted in the annual budget, may be acquired by the joint board without the approval of the governing bodies of its constituent public agencies.

(3) Eminent Domain. Eminent domain proceedings under this Section may be instituted only by authority of the governing bodies of the constituent public agencies of the joint board. If so authorized, such proceedings shall be instituted in the names of the constituent public agencies jointly, and the property so acquired shall be held by said public agencies as tenants in common until conveyed by them to the joint board.

(4) Disposal of Real Property. The joint board shall not dispose of any airport, air navigation facility or real property under its jurisdiction except with the consent of the governing bodies of its constituent public agencies, provided that the joint board may, without such consent, enter into the contract, lease or other arrangements contemplated by Section 4 of this Act.[2]

(5) Police Regulations. Any resolution, rules, regulations, or orders of the joint board dealing with subjects authorized by Section 7 of this Act[3] shall become effective only upon approval of the governing bodies of the constituent public agencies provided that upon such approval, the resolutions, rules, regulations or orders of the joint board shall have the same force and effect in the territories or jurisdictions

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[2]Article 46d-4.
[3]Article 46d-7.

involved as the ordinances, resolutions, rules, regulations or orders of each public agency would have in its own territory or jurisdiction.

(e) Joint Fund. For the purpose of providing a joint board with moneys for the necessary expenditures in carrying out the provisions of this Section, a joint fund shall be created and maintained, into which shall be deposited the share of each of the constituent public agencies as provided by the joint agreement. Each of the constituent public agencies shall provide its share of the fund from sources available to each. Any Federal, State or other contributions or loans, and the revenues obtained from the joint ownership, control and operation of any airport or air navigation facility under the jurisdiction of the joint board shall be paid into the joint fund. Disbursements from such fund shall be made by order of the board, subject to the limitations prescribed in Subsection (d) of this Section.

Acts 1947, 50th Leg., p. 188, ch. 114, §14.

TEXAS MUNICIPAL AIRPORTS ACT
(As Amended, 1985)

Art. 46d-14. Joint Operations.

(a) Authorization. For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality, as defined in this Act, any agency of the State government and of the United States, and municipality, political subdivision and agency of another State; and the term "governing body" means the governing body of a county or municipality, and the head of the agency if the public agency is other than a county or municipality and the term "airport hazard area" means any area of land or water upon which an airport hazard might be established if not prevented as provided in this Act. All powers, privileges and authority granted to any municipality by this Act may be exercised and enjoyed jointly with any public agency of any other State or of the United States to the extent that the laws of such other State or of the United States permit such joint exercise or enjoyment. If not otherwise authorized by law, any agency of the State government when acting jointly with any municipality, may exercise and enjoy all of the powers, privileges and authority conferred by this Act upon a municipality.

(b) Agreement. Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two (2) or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint acquisition and operation of airports, air navigation facilities, or airport hazard areas. Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. Each such agreement shall specify its duration, the proportionate interest which each public agency shall have in the property, facilities and privileges involved, the proportion to be borne by each public agency of preliminary costs and

costs of acquisition, establishment, construction, enlargement, improvement, and equipment of the airport, air navigation facility, or airport hazard area, the proportion of the expenses of maintenance, operation, regulation and protection thereof to be borne by each and such other terms as are required by the provisions of this Section. The agreement may also provide for: amendments thereof, and conditions and methods of termination of the agreement; the disposal of all or any of the property, facilities and privileges, jointly owned, prior to or upon said property, facilities and privileges or any part thereof, ceasing to be used for the purposes provided in this Act, or upon termination of the agreement; the distribution of the proceeds received upon any such disposal, and of any funds or other property jointly owned and undisposed of; the assumption or payment of any indebtedness arising from the joint venture which remains unpaid upon the disposal of all assets or upon a termination of the agreement; and such other provisions as may be necessary or convenient.

(c) Joint Board. Public agencies acting jointly pursuant to this Section shall create a joint board which shall consist of members appointed by the governing body of each participating public agency. The number to be appointed, their term and compensation, if any, shall be provided for in the joint agreement. Each such joint board shall organize, select officers for terms to be fixed by the agreement, and adopt and amend from time to time rules for its own procedure. The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport, air navigation facility, or airport hazard area to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport, air navigation facility or airport hazard area, subject to the limitation of Subsection (d) of this Section.

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(1) Expenditures. The total expenditures to be made by the joint board for any purpose in any calendar year shall be determined by a budget approved by the governing bodies of its constituent public agencies on or before the preceding December 1st.

(2) Acquisition Beyond Sums Allotted. No airport, air navigation facility, airport hazard, or real or personal property, the cost of which is in excess of sums therefor fixed by the joint agreement or allotted in the annual budget, may be acquired by the joint board without the approval of the governing bodies of its constituent public agencies.

(3) Eminent Domain. Eminent domain proceedings under this Section may be instituted only by authority of the governing bodies of the constituent public agencies of the joint board. If so authorized, such proceedings shall be instituted in the names of the constituent public agencies jointly, and the property so acquired shall be held by said public agencies as tenants in common until conveyed by them to the joint board.

(4) Disposal of Real Property, Use of Property by Others. The joint board shall not dispose of any airport, air navigation facility or real property under its jurisdiction except with the consent of the governing bodies of its constituent public agencies. However, the joint board may, without consent, enter into contracts, leases, or other arrangements for the use and occupancy by others of airport lands and personal property for the purposes specified in Section 4 of this Act upon such terms, for such rentals, revenues, and payments, and for such period or periods of years and with such options of renewal, as shall be approved by the joint board. It is provided, however, that if any such contract, lease, or other arrangement shall be for a term, including any renewal or option terms, in excess of 40 years, the same shall be subject to the approval of each of the governing bodies of the constituent public agencies of the joint board unless the necessity for such approval is waived by resolution of each such governing body.

(5) Police Regulations. Any resolutions, rules, regulations, or orders of the joint board dealing with subjects authorized by Section 7 of this Act shall become effective only upon approval of the governing bodies of the constituent public agencies provided that upon such approval, the resolutions, rules, regulations, or orders of the joint board shall have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations or orders of each public agency would have in its own territory or jurisdiction.

(6) Taxicab Licensing. A joint airport board established pursuant to this Act shall have power to license taxicabs picking up passengers at or delivering passengers to the airport and to charge and collect fees with respect to the issuance of licenses under this subdivision.

(7) Regulations. Any resolutions, rules, regulations, or orders of the joint board dealing with subjects authorized by Subdivision (6) of this subsection become effective only upon approval of the governing bodies of the constituent public agencies. Upon the approval, the resolutions, rules, regulations, or orders of the joint board have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations, or orders of each public agency would have in its own territory or jurisdiction.

* * *

Subsecs. (a) to (c) amended by Acts 1981, 67th Leg., p. 852, ch. 300 §2, eff. Aug. 31, 1981;

Subsec. (d) amended by Acts 1983, 68th Leg., p. 5322, ch. 978, §1, eff. Sept. 1, 1983;

Subsec. (d)(6), (7) added by Acts 1983, 68th Leg., p. 4022, ch. 626, §2, eff. Sept. 1, 1983;

Subsec. (d)(6) amended by Acts 1985, 69th Leg., ch. 268, §2, eff. June 5, 1985.

Tex.Rev.Civ.Stat.Ann. art. 1175 (20) and (21)(Vernon 1963):

Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty:

* * *

20. To license, operate and control the operation of all character of vehicles using the public streets, including motorcycles, automobiles or like vehicles, and to prescribe the speed of the same, the qualification of the operator of the same, and the lighting of the same by night and to provide for giving bond or other security for the operation of the same.

21. To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire or the transportation of freight for hire on the public streets and alleys of the city.

Supreme Court, U.S.
FILED
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No. 86-1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CARL WHORTON, KEN WHORTON, *et al.*,
Petitioners,

v.

SURTRAN TAXICABS, INC., YELLOW CAB OF DALLAS, INC., FORT WORTH CAB & BAGGAGE CO., INC., CITY OF DALLAS, TEXAS, CITY OF FORT WORTH, TEXAS, CITY OF IRVING, TEXAS, CITY OF GRAPEVINE, TEXAS,
Respondents.

BRIEF OF PRIVATE TAXI COMPANIES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS RELATED TO THE PRIVATE TAXI COMPANY RESPONDENTS

I.

IS THERE A, CASE OR CONTROVERSY AS TO THE PRIVATE TAXI COMPANY RESPONDENTS SINCE THE LOWER COURT ALSO DISMISSED THE ACTION AGAINST THEM ON AN INDEPENDENT AND ALTERNATIVE GROUND AS TO WHICH PETITIONERS DO NOT SEEK REVIEW?

II.

WHEN THERE WAS EXTENSIVE STATE REGULATION WHICH ESTABLISHED "A CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY" SHOWING "THE LEGISLATURE COMTEMPLATED THE ACTS COMPLAINED OF" BEFORE ANY AMENDMENT TO THE STATUTES IN QUESTION OCCURRED, DID THE LOWER COURT'S REFERENCE TO A SUBSEQUENT AMENDMENT, WHICH VALIDATED AND CONFIRMED THE CHALLENGED CONTRACTS AS "AN ADEQUATE INDICATION OF THE STATES DESIRE TO ALLOW JOINT AIRPORT BOARDS TO DISPENSE COMPETITION", RAISE AN IMPORTANT QUESTION RELATING TO RETROACTIVITY?

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IN THE

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OCTOBER TERM, 1986

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BRIEF OF PRIVATE TAXI COMPANIES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATUTES INVOLVED

The federal statutes involved are Article III of the Constitution; the Sherman Act, 15 U.S.C. §1 and 2; and the Clayton Act, 15 U.S.C. §35. The state statutes involved are the Texas Home Rule Statute, Tex. Rev. Civ. Stat. art. 1175 (Vernon 1963); the Texas Municipal Airport Act, Tex. Rev. Civ. Stat. art. 46d (Vernon 1969); and the Texas Motor Business Act, Tex. Rev. Civ. Stat. art. 911a (Vernon 1964).

JURISDICTION

The existance of an alternative defense as to the private taxi company respondents precludes a case or controversy under Article III of the Constitution.

STATEMENT OF THE CASE

The Dallas/Fort Worth Regional Airport ("Regional Airport") is owned by the City of Dallas, Texas ("Dallas"), and the City of Fort Worth, Texas ("Fort Worth"). The two cities built it between Dallas and Fort Worth, in a cooperative effort, at the request of the Federal Aviation Administration. The Dallas/Fort Worth Regional Airport Board ("Regional Airport Board") governs the Regional Airport, with rules and regulations approved by Dallas and Fort Worth. The system selected by Dallas, Fort Worth, and the Regional Airport Board to regulate and authorize taxicabs to serve the Regional Airport required contractual authority. These rules and regulations required taxi drivers and companies who wished to provide service to do so pursuant to a contract. Dallas, Fort Worth, and the Regional Airport Board contracted with Surtran Taxicabs, Inc. for the period from the end of 1974 to the start of 1985. The contractual authorization system is no longer used, and all drivers who wish to serve the Regional Airport do so under a permit system (which petitioners do not complain of) at the same cost they paid under the contract system.

In 1970 the Regional Airport Board decided to select one operator to handle all ground transportation needs, both bus and taxicab, from the Regional Airport to the ten-county area around the Regional Airport. Seven companies were invited to bid, but no bids were submitted to provide both bus and taxicab services. The decision of Dallas, Fort Worth, and the Regional Airport Board to select one ground transportation operator is at the heart of this controversy. This decision was based on the recommendation of

an independent consultant who had been hired to study transportation needs and to recommend means of implementing service. Several consultants were thereafter retained to provide technical assistance on ground transportation matters. The consultants continued to recommend the single operator system, but the system was later modified to allow all taxi drivers who wished to provide service the opportunity to do so.

When it became obvious that no single private transportation company could meet the bid criteria, Dallas and Fort Worth jointly formed the D/FW Surtan System ["Surtan System"] to serve as the single operator of all airport ground transportation services. Surtan System in turn contracted with the Regional Airport Board to provide all ground transportation for hire from the Regional Airport.

Dallas, Fort Worth, and Surtran System determined that Surtan System would subcontract with the private sector for taxicab services. Surtran System, which was managed by the Dallas Transit Department, provided bus service to or from the Regional Airport. The final bid criteria, adopted by the Regional Airport Board and approved by both Dallas and Fort Worth, required the potential taxi subcontractor to bid on outbound taxi service from the Regional Airport to anywhere in the surrounding ten-county area. The Dallas Transit Department, as manager of Surtran System, solicited bids from local taxi companies for taxi service.

Yellow Cab of Dallas, Inc. and Fort Worth Cab & Baggage Co., Inc. received approval from Surtran System to form a corporation to bid for taxi services. This company, Surtran Taxicabs, Inc., submitted the

only bid. Surtran Taxicabs, Inc. signed a contract with Dallas, Fort Worth, and Surtran System. This contract was renewed one time. Before the D/FW Airport opened, Surtran Taxicab, Inc. applied for and received, from the Railroad Commission of Texas ("Texas Railroad Commission") a Certificate of Public Convenience and Necessity to serve the D/FW Airport. During the second contract, Yellow Cab of Dallas, Inc., applied for and received such a certificate. No other company had such a certificate or authority during the term of either of the two contracts.

In the years before the 1983 amendments, referred to by petitioner, the two principal legislative acts by which the State of Texas provided for regulation of taxicab service at the Regional Airport were the Texas Municipal Airport Act, Tex. Rev. Civ. Stat. Ann. art. 46d (Vernon 1969), and the Texas Motor Bus Act, Tex. Rev. Civ. Stat. Ann. art. 911a (Vernon 1964). Under the Motor Bus Act, regulation was provided by a state agency, the Texas Railroad Commission. This regulation was mandatory and its terms were detailed by the statute. Under the Texas Municipal Airport Act, the regulation was provided by a joint airport board. This regulation was of the type which had traditionally been provided by cities within their limits. Since the Texas Municipal Airport Act, allows a joint airport board the same authority over taxicabs at a regional airport as cities have over taxicabs within their limits, one should also consider the authority which the State of Texas gives cities such as Dallas and Fort Worth to regulate taxicabs.

The following provisions of the Motor Bus Act, *supra*, were applicable before the 1983 amendments referred to by petitioners:

The term "Motor Bus Company" when used in this Act means every corporation * * * owning, controlling, operating or managing any motor propelled passenger vehicle * * * and engaged in the business of transporting persons for compensation or hire over the public highways within the State of Texas, whether operating over fixed routes or fixed schedules, or otherwise; * * * provided further, that the term "Motor Bus Company" as used in this Act shall not include corporations or persons, * * * insofar as they own, control, operate, or manage motor propelled passenger vehicles operated wholly within the limits of any incorporated town or city, and the suburbs thereof, whether separately incorporated or otherwise.

All motor-bus companies, as defined herein, are hereby declared to be "common carriers" and subject to regulation by the State of Texas, and shall not operate any motor propelled passenger vehicle for the regular transportation of persons as passengers for compensation or hire over any public highway in this State except in accordance with the provision of this Act. . .

It is hereby declared that when existing transportation facilities on any highway in this State do not provide passenger service which the Commission shall deem adequate to provide for public convenience on such highway, then such inadequacy of service shall be considered as creating a condition

where the public convenience and necessity require the designation of, and provision for, additional service on such highway, and it shall be the duty of the Commission to issue certificate or certificates as herein provided, if in the opinion of said Commission the issuance of such certificate will promote the public welfare.

The Commission is hereby vested with power and authority, and it is hereby made its duty to supervise and regulate the public service rendered by every motor bus company operating over the highways in this State, to fix or approve the maximum, or minimum, or maximum and minimum, fares, rates or charges of, and to prescribe all rules and regulations necessary for the government of, each motor bus company; to prescribe the routes, schedules, service, and safety of operations of each such motor bus company; to acquire the filing of such annual or other reports and of such other data by such motor bus company as the Commission may deem necessary.

* * *

The Commission is further authorized and empowered to supervise and regulate motor bus companies in all other matters affecting the relationship between such motor bus companies and the traveling public that may be necessary to the efficient operation of this law.

It shall be unlawful for any motor bus company to sell any tickets for the transportation

of passengers within this State over any motor bus line at any rates other than the rates, authorized and approved by the Commission under the terms of this law;

* * *

No motor-bus company shall hereafter regularly operate for the transportation of persons as passengers for compensation or hire over the public highways of this State without first having obtained from the Commission under the provisions of this Act a certificate or permit declaring that the public convenience and necessity require such operation;

* * *

The Commission is hereby vested with power and authority, and it is hereby made its duty upon the filing of an application for a certificate of public convenience and necessity, to ascertain and determine under such rules and regulations as it may promulgate, after considering existing transportation facilities on such highway, the service rendered and capable of being rendered thereby, and the demand for, or need of additional service, if there exists a public necessity for such service, and if public convenience will be promoted by granting said application and permitting the operating of motor vehicles on the highways designated in such application, as a common carrier for hire.

* * *

Any officer, agent, servant, or employee of any corporation and every other person who violates or fails to comply with, or who procures, aids, or abets in the violation of any provisions of this Act shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not to exceed Five Hundred ($500.00) Dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment; and the violations occurring on each day shall each constitute a separate offense.

Any officer, agent, servant, or employee of any motor bus company as heretofore defined, and any motor bus company, as heretofore defined and/or the owner or operator, officer, servant, agent or employee, or any such owner or operator of any bus terminal who violates or fails to obey, observe or comply with any order, decision, rule or regulation, direction, demand or requirement of the Commission shall be subject to and shall pay a penalty not exceeding Five Hundred ($500.00) Dollars, for each and every day of such violation. Such penalty to be recovered in any court of competent jurisdiction in Travis County, Texas, or in the County in which the violation occurs. Suit for such penalty or penalties shall be instituted and conducted by the Attorney General of the State of Texas, or by the county or district attorney of the county in which the violation occurs, in the name of the State of Texas, and by

direction of the Railroad Commission of Texas.

The following provisions of the Code of Rules and Regulations of the Dallas/Fort Worth Regional Airport Board were applicable before the 1983 amendment referred to by petitioners:

> The provisions of this Code shall constitute a special enactment of effect only within the boundaries of the Dallas-Fort Worth Regional Airport, and adopted in cooperation and concert with other Cities in recognition of the unique and special requirements of the planning, . . . operation, regulation, and protection and policing of the Dallas-Fort Worth Regional Airport. . . . To the extent of any conflict between the existing or future general ordinances of any city and this Code, this Code shall prevail only within the boundaries of the Dallas-Fort Worth Regional Airport and not otherwise.
>
> It shall be unlawful for any person to solicit ground transportation business on the Airport, or to pick up passengers or baggage for hire on the Airport without a ground transportation permit from the Airport Board, or without having an Airport Board Concession, License or Franchise therefor, and, to the extent of any operations outside the Airport Boundaries, without a license, permit or franchise from any City through which said business is conducted if lawfully regulated by the ordinances of any such city.

Duly certified copies of all rules, regulations and orders of the Dallas-Fort Worth Regional Airport Board pertaining to the subjects mentioned in Section 3; and prescribing penalties for violations, shall be forwarded by the Executive Director to the chief administrative officer of each city adopting this Code, and if the City Council of such City shall elect to enact such rules, regulations and orders in the manner and form prescribed for other penal ordinances of such City, the municipal court or courts of such City shall each have concurrent jurisdiction with any other proper forum over offenses arising thereunder and within the corporate limits of such City; and the duly authorized and commissioned security officers or other enforcement officers of the Dallas-Fort Worth Regional Airport shall thereafter be authorized to file cases arising thereunder in such municipal courts, in addition to any other convenient and proper forum.

The authorized and commissioned security officers of the Dallas-Fort Worth Regional Airport Board shall issue and use traffic citations and summons of the type now used by the Texas Highway Patrol with such changes as are necessitated to render same applicable to the Dallas/Fort Worth Regional Airport.

* * *

Airport Police. The primary responsibility for police, fire and health security and for

> the enforcement of regulations, and for the performance of inspections and services within the boundaries of the Dallas-Fort Worth Regional Airport shall be vested in the Dallas-Fort Worth Regional Airport Board and in the Police force and such health officers as may from time to time be duly appointed and commissioned as such officers by the Dallas-Fort Worth Regional Airport Board.
>
> . . .the violation of any provision of The Code of Rules and Regulations of the Dallas-Fort Worth Regional Airport Board where an act or a failure to act is made unlawful or is otherwise prohibited, shall be punishable by a fine not to exceed Two Hundred Dollars ($200.00), and each day a violation shall continue shall constitute a separate offense; provided, however, where the offense is one for which a penalty is fixed by state law, the latter penalty shall govern.

The Municipal Airport Act, contained the following provisions before the 1983 amendments referred to by petitioners:

> [t]wo (2) or more municipalities are specifically authorized to make . . . agreements . . . for the joint acquisition and operation of airports. . . . Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action.
>
> The joint board shall have power to . . . operate, regulate, protect and police any air-

> port . . . to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport,. . . subject to the limitations of Subsection (d) of this Section.
>
> Police Regulations. Any resolutions, rules, regulations or orders of the joint board dealing with subjects authorized by Section 7 of the Act shall become effective only upon approval of the governing bodies of the constituent public agencies provided that upon such approval, the resolutions, rules, regulations or orders of the joint board shall have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations or orders of each public agency would have in its own territory or jurisdiction.
>
> * * *
>
> [t]he . . . operation, regulation, protection and policing of airports . . . and the exercise of any other powers herein granted to municipalities and . . . to be severally or jointly exercised, are hereby declared to be public and governmental functions, exercised for a public purpose, and matters of public necessity; . . . and in the case of any municipality other than a county, are declared to be municipal functions and purposes as well as public and governmental.

The act provides two cities may jointly do what a city may do individually, and the act provides a city may:

> . . .regulate, protect and police airports . . ., either within or without the territorial limits of such municipality . . . including the . . . operation at such airports of . . . facilities . . . for the comfort and accommodation of air travelers. . . .
>
> * * *
>
> In operating an airport . . ., such municipality may, . . . enter into contracts, . . . and other arrangements for a term not exceeding forty (40) years with any persons:
>
> (1) granting the privilege of using . . . such airport . . ., or space therein for commercial purposes;
>
> (2) conferring the privilege of supplying . . ., services . . . at such airport. . . .
>
> (3) making available services to be furnished by the municipality . . . at such airport. . . .
>
> In each case the municipality may establish the terms and conditions and fix the charges, . . . or fees for the privileges or services, which shall be reasonable and uniform for the same class of privilege or service and shall be established with due regard to the property and improvements used and the expenses of operation to the municipality.

The Texas Home Rule Statute included the following provisions prior to the 1983 amendment referred to by petitioners:

> . . . (home rule cities) shall have full power of local self-government, and among the other

powers that may be exercised by any such city the following are hereby enumerated for greater certainty:

* * *

To hold . . . any character of property,. . . .

* * *

To prohibit the use of any street, . . ., or grounds of the city by any . . . character of public utility without first obtaining the consent of the governing authorities expressed by ordinance and upon paying such compensation as may be prescribed and upon such condition as may be provided by any such ordinance. To determine, fix and regulate the charges, fares or rates of any person, firm or corporation enjoying or that may enjoy the franchise or exercising any other public privilege in said city and to prescribe the kind of service to be furnished by such person, firm or corporation, and the manner in which it shall be rendered. . . .

* * *

To license, operate and control the operation of all character of vehicles using the public streets, including . . ., automobiles. . . .

To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire . . . on the public streets and alleys of the city.

* * *

To license any lawful business, occupation or calling that is susceptible to the control of the police power.

During the 1983 legislative year, the Texas legislature passed House Bill 593. In the portion of House Bill 593 which dealt with the Texas Railroad Commission's authority over motor bus companies, the legislature provided that the Railroad Commission would continue to exercise authority over taxicab companies providing service from the Dallas/Fort Worth Regional Airport. That bill provides in part as follows:

AN ACT

Relating to the administration, power, duties, and continuation of the Railroad Commission of Texas, including the regulation of transportation. . . .

* * *

Section 14. Subsection (c), Section 1, Chapter 270, Acts of the 40th Legislature, Regular Session, 1927 (Article 911a, Vernon's Texas Civil Statutes), is amended to read as follows:

(c) the term "Motor Bus Company" when used in this Act means every corporation, or persons as herein defined, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled passenger vehicle not usually operated on or over rails, and engaged in the business of

> transporting persons for compensation or hire over the public highways within the State of Texas, whether operating over fixed routes or fixed schedules, or otherwise. However, the term "Motor Bus Company" as used in this Act shall not include: . . .
>
> (3) corporations or persons, their lessees, trustees, or receivers, or trustees appointed by any court whatsoever, insofar as they own, control, operate, or manage motor propelled taxicabs designed for carrying no more than five passengers; permits, licenses, or certificates issued prior to June 1, 1983, would not be affected by the provisions of this exclusion. *Such taxicabs are motor buses only when they operate to or from an airport established pursuant to Chapter 114, Acts of the 50th Legislature, 1947, as amended (Article 46d-1 et seq., Vernon's Texas Civil Statutes).* [Emphasis supplied.]

This amendment clearly affirmed the jurisdiction of the Texas Railroad Commission over taxicab service at the Regional Airport.

In the same 1983 legislative session, the legislature also passed Senate Bill 960, which provides in pertinent part:

> SECTION 2. Subsection (d) Section 14, Municipal Airports Act (Article 46d-14, Vernon's Texas Civil Statutes), is amended by adding Subdivisions (6) and (7) to read as follows: "(6) Taxicab Licensing. Notwithstanding any contrary provisions in H.B. 593, Acts of the 68th Legislature, Regular Ses-

> sion, 1983, a joint airport board established pursuant to Chapter 114, Acts of the 50th Legislature, Regular Session, 1947, as amended (Article 46d-14, Vernon's Texas Civil Statutes), shall have power to license taxicabs picking up passengers at or delivering passengers to the airport.
>
> (7) Regulations. Any resolutions, rules, regulations, or orders of the joint board dealing with subjects authorized by Subdivision (6) of this subsection become effective only upon approval of the governing bodies of the constituent public agencies. Upon the approval, the resolutions, rules, regulations, or orders of the joint board have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, or order of each public agency would have in its own territory or jurisdiction.

This language expressly authorized the use of a license system by a Regional Airport Board in addition to the contractual system which continued to be authorized.

Subsequent to the passage of House Bill 593 and Senate Bill 960, the 1983 legislature passed Senate Bill 28. That act amended House Bill 593, and provides in pertinent part as follows:

> AN ACT
>
> Relating to the regulation of taxicabs serving airports
>
> BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subsection (c), Section 1, Chapter 270, Acts of the 40th Legislature, Regular Session, 1927 (Article 911a, Vernon's Texas Civil Statutes), as amended by H.B. 593, Acts of the 68th Legislature, Regular Session, 1983, is amended to read as follows:

"(c) The term 'Motor Bus Company' when used in this Act means every corporation or persons as herein defined, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, owning, controlling, operating or managing any motor propelled passenger vehicle not usually operated on or over rails, and engaged in the business of transporting persons for compensation or hire over the public highways within the State of Texas, whether operating over fixed routes or fixed schedules, or otherwise. However, the term 'Motor Bus Company' as used in this Act shall not include: . . .

"(3) corporations or persons, their lessees, trustees, or receivers, or trustees appointed by any court whatsoever, insofar as they own, control, operate, or manage motor propelled taxicabs designed for carrying no more than five passengers; permits, licenses, or certificates issued prior to June 1, 1983, would not be affected by the provisions of this exclusion. *Such taxicabs are motor buses only when they operate to or from an airport established pursuant to Section 14, Chapter 114, Acts to the 50th Legislature, 1947, as amended*

(Article 46d-14 Vernon's Texas Civil Statutes)." [Emphasis supplied.]

This legislation also made it clear that the Texas Railroad Commission retained its jurisdiction over motor bus companies or taxicabs servicing a jointly-owned municipal airport such as the Regional Airport in question.

The Texas Railroad Commission then promulgated a rule, 16 Texas Administrative Code § 5.248, which had the effect of administratively deregulating the Regional Airport from Texas Railroad Commission regulation. This occurred during the final months of Surtran Taxicab, Inc.'s second five-year contract. When this rule was passed, Surtran Taxicabs, Inc. and Yellow Cab of Dallas, Inc. brought a declaratory judgment against the Texas Railroad Commission, Dallas, Fort Worth, and the Regional Airport Board. A judgment was entered in the state district court suit which considered and interpreted the statutes before the 1983 amendments, after the 1983 amendments, and the rule which had been adopted by the Texas Railroad Commission:

* * *

> ORDERED, ADJUDGED AND DECREED that this is an appropriate action for a declaratory judgment pursuant to Art. 6252-13(a), V.T.C.A. and Art. 224-1 V.T.C.A., and for injunction.
>
> It is further ORDERED, ADJUDGED AND DECREED that the amended regulations approved by the Dallas/Fort Worth Regional Airport Board on or about December 16, 1983, and thereafter approved by the City

of Dallas and the City of Fort Worth, which became effective January 1, 1984, are authorized by the Municipal Airport Act Art. 46d-14, V.T.C.S. and said amended regulations are lawful except for Sec. 8-5(b) and are not inconsistent with the Motor Bus Act, Art. 911a, V.T.C.S.

* * *

It is further ORDERED, ADJUDGED AND DECREED that the recent Rule adopted by the Railroad Commission of Texas, 16 Texas Administrative Code Sec. 5.248(b)(2)(c)(i), is inconsistent with the Motor Bus Act Art. 911a, V.T.C.S. and the portion of said aforementioned Rule which provides that taxicab service within the licensing jurisdiction of the Dallas/Fort Worth Regional Airport Board may be performed without a certificate issued by the Railroad Commission of Texas is invalid.

It is further ORDERED, ADJUDGED AND DECREED that the Railroad Commission of Texas does not have authority to allow taxicabs to operate from the Dallas/Fort Worth Regional Airport to the ten county area around said airport without a Certificate of Public Convenience and Necessity and compliance with other provisions of the Motor Bus Act.

It is further ORDERED, ADJUDGED AND DECREED that no taxicab company or taxicab driver may provide service from the Dallas/Fort Worth Regional Airport to

the ten county area around said airport unless they do so pursuant to both a Certificate of Public Convenience and Necessity from the Railroad Commission of Texas and authority from the Dallas/Fort Worth Regional Airport Board, and all taxicab companies and taxicab drivers must comply with the provisions of the Motor Bus Act, 911 V.T.C.S. and Dallas/Fort Worth Regional Airport Board's amended regulations which became effective January 1, 1984, before they may transport passengers by taxicab from the Dallas/Fort Worth Regional Airport to the ten county area around the Airport.

The District concludes and it is ADJUDGED that the Railroad Commission of Texas has the duty to regulate taxicab service from the Dallas/Fort Worth Regional Airport to the ten county area around the Airport.

It is further ORDERED, ADJUDGED AND DECREED that Terminal Cab Company, Inc. is enjoined from providing taxi service from the Dallas/Fort Worth Regional Airport without a Certificate of Public Convenience and Necessity from the Railroad Commission of Texas.

* * *

This judgment confirmed concurrent jurisdiction at the Regional Airport of both the Regional Airport Board and the Texas Railroad Commission. The court held that the Texas Railroad Commission was required by the Motor Bus Act, to regulate taxicab

service at the Regional Airport. This judgment was appealed by the defendants and became moot while on appeal in 1985 when the Texas legislature again amended the Texas Motor Bus Act. This amendment removed taxicabs from the definition of a motor bus company. All taxicab companies now provide service under a license system.

I. There Is No Case Or Controversy As To The Private Taxi Company Respondents Under Article III Of The Constitution

Insofar as the private taxi company respondents are concerned, the petition does not present a case or controversy. Under Article III of the Constitution a case or controversy is an indispensable prerequisite to jurisdiction. As stated in *Flast v. Cohen,* 392 U.S. 83, 20 L.Ed. 2d 947, 88 S. Ct. 1942 (1968):

> The jurisdiction of federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.

The petitioners only ask the Court to grant certiorari to review of one of two propositions, either one of which the lower court found was sufficient to preclude any relief as to the private taxi companies. Regarding the private taxi companies, the lower court noted that the issues were:

> I. Should these consolidated actions be dismissed because the Defendants' challenged activities are immune from scrutiny under the antitrust laws by virtue of the state action exemption?
>
> * * *
>
> III. Should the Plaintiffs' claims against the private taxi company defendants be dismissed as barred under the *Noerr-Pennington* doctrine?

The lower court determined:

> I. Plaintiffs' antitrust claims are DISMISSED because the Defendants' challenged activities are immune from scrutiny under the antitrust laws by virtue of the state action exemption.
>
> * * *
>
> III. Plaintiffs' antitrust claims against the private Defendants are DISMISSED as barred under the *Noerr-Pennington* doctrine.

The petition before this Court does not request certiorari to review the lower court's determination that the *Noerr-Pennington* doctrine was applicable as a defense for the private taxi companies. Even if the Court should, and it should not because such holding

was correct, reverse the lower court's holding that the state action exemption applied, the unchallenged holding that the *Noerr-Pennington* defense also applied would still result in a dismissal of the petitioner's claims as to the private taxi companies. It is also significant that the test under the state action exemption for a private person is different from the test for a governmental body. *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 105 S.Ct. 1713, (1985) and *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48, 105 S.Ct. 721, (1985).

Whether there is a case or controversy is determined at the time the issue is considered. *Golden v. Zwickler,* 394 U.S. 103, 22 L.Ed. 2d 113, 89 S.Ct. 956 (1969). As of the time this petition is presented, there is no case or controversy as to the private taxi companies. First, if a favorable resolution of the question petitioners seek to present as to these respondents will not give the petitioners relief, the minimum standards of a case or controversy have not been met. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 48 L.Ed. 2d 450, 96 S.Ct. 1917 (1976); *Murphy v. Hunt,* 455 U.S. 478, 71 L.Ed. 2d 353, 102 S.Ct. 1181 (1982). Even if the petitioners' question on the state action defense were answered in their favor, the private taxi companies' *Noerr-Pennington* antitrust immunity remains intact, barring petitioners' claim.

As this Court has stated, when any one of several propositions would support the judgment rendered, and one of the propositions is found sufficient, it is unnecessary to consider the others:

> The information consists of several counts, to all of which exceptions are taken. The

> Court however is of the opinion that the Fourth Count is good and this renders it unnecessary to decide the others.

Locke v. United States, 11 U.S. 339, 3 L.Ed. 364. In short, a federal court will not act on a question when there is no case or controversy, *O'Shea v. Littleton,* 414 U.S. 488, 38 L.Ed. 2d 674, 94 S.Ct. 669 (1974); and there is none here.

A cause of action may present a case or controversy as to some and not to other parties. Dismissal of the parties in the action as to which there is no case or controversy is proper. *Roe v. Wade,* 410 U.S. 113, 35 L.Ed. 2d 147, 93 S.Ct. 705 (1973). Therefore, the private taxicab companies must be dismissed since no case or controversy exists as to them.

A second reason for denying the petition is mootness. An issue is *moot* if no order of the Court could properly affect the petitioner's rights with respect to the issue the Court is asked to review. *Honig v. Students of California School for the Blind,* 471 U.S. _ , 85 L.Ed. 2d 114, 105 S.Ct. ___(1985). The inability of a Court to grant any effectual relief renders the matter moot. *Brownlowe v. Schwartz,* 261 U.S. 216, 43 S.Ct. 263, 67 L.Ed. 620 (1923); *Heitnuller v. Stokes,* 256 U.S. 359, 65 L.Ed. 990, 41 S.Ct. 522 (1921); *Pease v. Rathbren-Jones Engineering Co.,* 243 U.S. 273, 61 L.Ed. 715, 37 S.Ct. 283 (1917); *Tennessee v. Condors,* 189 U.S. 64, 47 L.Ed. 709, 23 S.Ct. 579 (1903); *Mills v. Green,* 159 U.S. 651, 40 L.Ed. 293, 16 S.Ct. 132 (1985).

Because the private taxicab companies are immune from antitrust liability on other valid grounds, the state action defense question is moot as to them. This

Court has consistently held that it is its duty "to decide actual controversies by a judgment which can be carried into effect and not to give opinions on moot questions or abstract propositions, or to decide principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green, supra; Local No. 8-6 v. Missouri,* 361 U.S. 363, 4 L.Ed. 2d 373, 8 S.Ct. 391 (1960).

There must be a personal stake in the outcome of the controversy in order to assure the adverseness of the litigation. *Sierra Club v. Morton,* 405 U.S. 727, 31 L.Ed. 2d 636, 92 S.Ct. 1361 (1972); *Valley Forge College v. Americans United,* 454 U.S. 464, 70 L.Ed. 2d 700, 102 S.Ct. 752 (1982); *Linda R. S. v. Richard D.,* 410 U.S. 614, 35 L.Ed. 2d 536, 93 S.Ct. 1146 (1973), *Socialist Tabor Party v. Gilligan,* 406 U.S. 583, 32 L.Ed. 2d 317, 92 S.Ct. 1716 (1972). In fact, "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre v. United States,* 319 U.S. 41, 63 S.Ct. 910 87 L.Ed. 1199 (1943) (emphasis added); *DeFunis v. Odegaard,* 416 U.S. 312, 40 L.Ed. 2d 164, 94 S.Ct. 1704 (1974); *Honig v. Students of Cal. School For Blind,* 471 U.S. ___, 85 L.Ed. 2d 114, 105 S.Ct. ___ (1985); *Hall v. Beals,* 396 U.S. 45, 24 L.Ed. 2d 214, 90 S.Ct. 200 (1969).

Here, the Courts' opinion on whether the state action exemption was properly applied to the private respondents cannot affect the petitioners' rights at all. When a question becomes moot it is no longer sufficient as a case or controversy. *Lane v. Williams,* 455 U.S. 624, 71 L.Ed. 2d 508, 102 S.Ct. 1322 (1982); *Natural Milk Producers Association of California v.*

City and County of San Francisco, 317 U.S. 423, 63 S.Ct. 359, 87 L.Ed. 375 (1943); *Kremens v. Bartley,* 431 U.S. 119, 52 L.Ed. 2d 184, 97 S.Ct. 1709 (1977); *Amalgated Association v. Wisconsin Employment Relations Board,* 340 U.S. 416, 95 L.Ed. 389, 71 S.Ct. 373 (1951); *United States v. Alaska Steamship Company,* 253 U.S. 113, 64 L.Ed. 808, 40 S.Ct. 448 (1920). A request for an advisory opinion or for an answer to hypothetical question does not present a case or controversy. *Princeton University v. Schnid,* 455 U.S. 100, 70 L.Ed. 855, 102 S.Ct. 867 (1982); *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450, 89 L.Ed. 1725 65 S.Ct. 1384 (1945); *Gilligan v. Morgan,* 413 U.S. 1, 37 L.Ed. 2d 407, 93 S.Ct. 2440 (1973); *Laird v. Tatum,* 408 U.S. 1, 33 L.Ed. 2d 154, 92 S.Ct. 2318 (1972); *O'Shea v. Littleton,* 414 U.S. 488, 38 L.Ed. 2d 674, 94 S.Ct. 669 (1974). Because there was a basis for denying liability on the part of the private taxi company defendants which is not at issue, any decision on the state action defense by this Court would be merely advisory.

This Court does not decide issues "unless absolutely necessary to a decision of the case." *United States v. International Union,* 352 U.S. 567, 1 L.Ed. 2d 563, 77 S.Ct. 529 (1957). There is no such necessity here. Because the Supreme Court "has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them," *North Carolina v. Rice,* 404 U.S. 244, 30 L.Ed. 2d 413, 92 S.Ct. 402 (1971), the petition does not present a case or controversy.

II. Because State Regulation Which Established "A Clearly Articulated And Affirmatively Expressed State Policy" Showing "The Legislature Contemplated The Acts Complained Of" Without The Subsequent Amendment Which Validated And Confirmed The Contracts Complained Of, The Petition Presents Nothing Of Importance

There are not special and important reasons for granting a writ of certiorari here. This case does not present a situation where the decision of the Court of Appeals is in conflict with another Court of Appeals on the same matter, and a federal question has not been decided by the Court of Appeals in a way that is in conflict with applicable decisions of this court. Sup. Ct. R. 17. For these reasons alone, the Petitioners' Writ should be denied.

The Petitioners' argument that a writ of certiorari should be issued is based on the lower Court's reference to language in a 1983 amendment to the Texas Municipal Airport Act. According to Petitioners, this reference indicated that the lower court had applied a retroactive rather than prospective test. The Petitioners attempted to use the same amendment in the trial court to argue that during the period before the 1983 Amendment, a "regulatory void" had existed in which no governmental entity had any authority to regulate taxi service at the airport. The argument was rejected on the basis that "[t]he opposite is true," and the lower Court held that "[t]his clarifying legislation does not suggest that no power to regulate existed before its enactment." *Woolen v. Surtran Taxicabs,* 801 F.2d 159, ___(5th Cir. 1986).

There was direct regulation of taxicab service at the Dallas/Fort Worth Regional Airport, by the State

of Texas, both before and after the 1983 amendments referred to by petitioners. A review of the applicable acts set forth in the Statement Of The Case establishes that extensive state regulation existed throughout the period in which the respondent taxicab companies served the Regional Airport.

The Texas Municipal Airport Act gave cities which jointly owned an airport outside their limits the same authority to regulate taxicabs at such airport as they had to regulate taxicabs in their city limits. The Regional Airport Board therefore had extensive authority to regulate taxicabs at the Regional Airport. The provisions of the Texas Motor Bus Act gave the Texas Railroad Commission extensive regulatory authority over taxicabs or vehicles for hire which operated on state highways from the Regional Airport. This regulation determined who could serve, the terms of this service, and the rates charged. All these regulations were enforced by a criminal penalty for a violation.

The conclusion by petitioners that a retroactive test was utilized is based on a misconstruction of what the lower court held and a disregard for what the record reflects regarding applicable legislation. There is no language in the opinion of the lower court which states that a retroactive rather than prospective test may be applied in any antitrust analysis. The reference to the subsequent amendment was viewed as nothing more than confirmation that "the legislature contemplated the kind of action complained of." The fact that the lower court expressly referred to the amendment as "clarifying legislation" establishes that this was not something new. In fact, the lower court stated that the amendment relied upon by petitioner

"does not suggest that no power to regulate existed before its enactment."

At best the dispute turns on a factual analysis of whether there was or was not sufficient statutory regulation before the amendment referred to, and this dispute is not sufficient for certiorari. *United States v. Johnson,* 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1925); *Texas v. Mead,* 465 U.S. 714 104 S.Ct. 1318, 79 L.Ed. 2d 714 (1984). This case is identical to *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.,* 760 F.2d 607 (5th Cir.) *cert. denied,* ___ U.S. ___ (1985), in all important respects, and the denial of certiorari in that case indicates certiorari should be denied in this case.

CONCLUSION

As to the private taxi company respondents, there is no justifiable controversy. In the unlikely event that all the points petitioners raised were resolved in petitioners' favor, petitioners would still not be entitled to relief as to the private taxi company respondents. The lower court's opinion is correct. It follows the decisions of other circuit courts as well as this Court's decisions. The petition ignores applicable state statutes and misconstrues the lower court's decision in an attempt to interject some question of importance in this matter when none exists. The petition should be denied.

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No. 86-1045

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Supreme Court of the United States

OCTOBER TERM, 1986

CARL WHORTON, KEN WHORTON, *et al.*,
Petitioners,

v.

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Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I.

The private taxi company respondents assert, as stated in their issue on p. i, and argued on pp. 22-24, that the district court dismissal was based upon "an *independent* and alternative ground" (emphasis added). This assertion is incorrect. The district court's dismissal of the private defendants under the *Noerr-Pennington* doctrine in Part III of the opinion was *dependent* upon the conclusion of law reached in Part

1A and B. That conclusion of law was that the Cities and Joint Airport Board had the power and authority under state law by contract to create a ten county regional taxicab monopoly over transportation through territory not subject to their regulatory power during the period 1974 to 1979. If the district court was wrong in that conclusion of law in Part IA and B, and the Cities and Joint Airport Board therefor had incomplete power, incomplete authority, incomplete jurisdiction under state law to do what they did in creating the deadheading monopoly during 1974 to 1979, then the district court utilized an erroneous state substantive law standard in granting the summary judgment motion based on the *Noerr-Pennington* defense. In addition, Part II of the district court's opinion shows unequivocally that the district court held that if the court's conclusion in Parts 1A and B was wrong, then the private defendants could be liable for damages, implying that *Noerr-Pennington*, as discussed in Part III, would be no defense. The ruling in Part III was necessarily dependent upon a correct ruling in Part IA and B and must be reexamined if the ruling on substantive law in Part IA and B is incorrect. See *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986).[1]

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[1] The district court granted summary judgment upon the limited discovery record permitted for the class hearing and denied Whorton any further direct discovery on the merits. Even so, the Whorton plaintiffs, unlike the Dallas Taxi Association plaintiffs, vigorously argued to the district court and to the Fifth Circuit that there was substantial evidence of sham, rigged bidding in the record. However, both the district court and Fifth Circuit adopted the view of the defendants, as supported by the Taxi Association plaintiffs, that there was no substantial dispute as to the facts. See Part II, *infra*.

II.

The briefs of all respondents, as does the opinion of the district court, seriously misstate the position of the Whorton plaintiffs by attributing to them the specious "regulatory void" and "ownership" arguments, and other defaults and concessions made by the Dallas Taxi Association plaintiffs. To the contrary, the Whorton plaintiffs have always argued that the Cities and Board usurped the State Railroad Commission power in territory outside the territory of the Cities and Board. (See *infra,* n. 2) The Dallas Taxi Association is an association chartered by the defendant Yellow Cab Co. and was designated as the class representative by the district court in an attempt to exclude the Whortons' lawyers and representation from the litigation. *Woolen v. Surtran Taxicabs,* 684 F.2d 324 (5th Cir. 1982). After reversal, the district court continued functionally to ignore the Whortons and to treat the Dallas Taxi Association plaintiffs as the true plaintiffs, when the reverse is true. The substantial defaults throughout this litigation by the Dallas Taxi Association and other designated class representatives continue in this Court by the absence of a petition for certiorari by them. *Cf. Hansberry v. Lee,* 311 U.S. 32 (1940).

III.

The private taxi company respondents argue in point II of their brief that state legislation pre-existing 1983 shows "the Legislature Contemplated the Acts Complained Of." (p. 28) This argument, as does the opinion of the district court, begs the essential question: Acts *by whom?* Assuming that prior to 1983 the Texas Legislature had delegated to the State Rail-

road Commission regulatory power to create a ten county regional taxicab monopoly over transportation through the territories not within city or airport boundaries, this unexercised state power in no way implied that the Cities and Joint Airport Board had the power to usurp that authority during the period 1974 to 1979.

This same argument made here now by the private taxi company defendants was rejected by Judge Patrick Higginbotham when he ruled in 1978 that the fact that the Texas State Railroad Commission had issued a certificate of convenience to the defendants to operate was no evidence of State intent, under the state action doctrine, to validate the monopoly contract deadheading scheme created by the Cities, Joint Airport Board and private defendants. *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1032, 1033 (N.D. Tex. 1978).[2]

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[2] The three City-Respondent briefs here could not escape inconsistency with the private taxicab companies' response brief on this central issue because the cab companies have already obtained a state court adjudication that the State retained power in its Railroad Commission until 1985 (Private Taxi Response Brief, p. 21). The City Respondents mounted a massive but successful lobbying effort to moot the appeal of that state court opinion and have the state relinquish all control and grant the Airport Board full authority over airport taxis. (Taxi Response Brief, p. 22).

The Parties' briefing shows that the state legislative history consistently rejected the taxi monopoly, first by maintaining some state control during the time of the anti-trust violations alleged herein, and when, after the institution of this suit, the cities began a consistent history of opposing the taxi monopoly, the legislature favored the cities changed policy of opposing monopolies and relinquished full authority to them in 1985.

Judge Higginbotham's 1978 ruling became the law of the case governing the DFW Airport. In response to his ruling, the defendants eliminated the required deadheading and instituted a pickup fee for all cabs. Further, in order to escape from the antitrust damage claim for the period 1974-79, permitted by Judge Higginbotham's 1978 ruling, the defendants obtained passage of the language in the 1983 legislation "validating" the 1974-1979 contract. Thus the 1983 retroactive "validation" legislation in light of Judge Higginbotham's law of the case,[3] was essential to infuse the 1974-79 contract, not originally authorized by state law, with authority. Far from being surplusage, the district court's literal language stating "the [1983] validation statute *itself*, . . . by validating and confirming the contracts in question, is an adequate indication [of state policy]" [emphasis added], 615 F. Supp. at 349, 801 F.2d at 163, is both essential to the ruling and employs a seriously erroneous standard of federal law.

This case holds no international implications. The antitrust violations by these respondents affect only

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[3] The Fifth Circuit's 1985 ruling in the Houston Airport case, *Independent Taxicab Drivers Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir.), *cert. denied*, ___ U.S. (1985) was careful to avoid mentioning Judge Higginbotham's published 1978 opinion in the DFW case and did not overrule his opinion and the rule of the case governing the DFW regional airport. The Fifth Circuit in the Houston case did not address the 1983-85 Texas legislation because that legislation was directed exclusively to ending the monopoly at the DFW joint regional airport. Unlike cab service at the Houston airport and City of Houston, whose territorial boundaries are self-contained, the taxicab transportation to and from DFW passed through multiple counties and necessarily implicated the power, authority and jurisdiction of the Texas State Railroad Commission.

the domestic market place. Therefore traditional antitrust standards should prevail.

IV.

The issues raised by Whorton Petitioner's challenge here to the interpretation and application to the Local Government Antitrust Act are fairly within the scope of the plain error in the district court's legal analysis apparent on the face of its opinion and within the scope of the Petitioner's multiple arguments for equitable relief to the Fifth Circuit.[4] There is no waiver. However, if the States are allowed to grant retroactive immunity to past municipal contracts in violation of federal antitrust law, this second issue may effectively be preempted in the future.

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[4] Whorton's original appeal brief in the Fifth Circuit, pp. 32-36, pp. 45-48, reply brief, pp. 24-25.

CONCLUSION

For the foregoing reasons and the reasons stated in our petition, the petition for a writ of certiorari should be granted to preserve this Court's standards applicable to domestic antitrust law.

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